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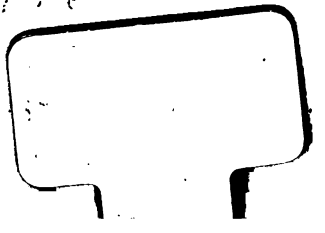

REAL PROPERTY.

TYAS'S LEGAL HAND-BOOKS.

THE

NATURE AND LAW

OF

REAL PROPERTY;

COMPRISING

A SPECIFICATION OF CORPOREAL AND INCORPOREAL HEREDITAMENTS, WITH THE RIGHTS INCIDENT THERETO.

A STATEMENT OF THE INJURIES TO WHICH THEY ARE LIABLE, AND THE REMEDIES AND PENALTIES CONSEQUENT THEREUPON, DOWN TO THE LATEST REGULATIONS OF THE LAW.

REALTY.

London:
ROBERT TYAS, 8, PATERNOSTER ROW;
AND SOLD BY
R. HASTINGS, 19, CAREY STREET, LINCOLN'S INN.

MDCCCXL.

LONDON:
CLARKE, PRINTERS, SILVER STREET, FALCON SQUARE.

PREFACE.

On the first projection of the series of the Legal Hand-Books, it was the urgent desire of the Publisher that each subject should be confined within a separate part; but the department on which this little volume treats was found to be so profluent of interest, and so full of detail, that any attempt to comprise the whole treatise within the prescribed limits was soon felt by its author to be perfectly futile; and he therefore determined, after much consideration to abide by the principle of giving one portion of a subject in a useful and important way, rather than a glimpse of all its parts, without profit from any.

The following pages are confined to realty alone, and consequently to exclude the doctrine of the property issuing out of it. He hopes, however, shortly to remedy the defect, by going

into the principle of estate in real property, and thus making the subject complete. In the meantime, he trusts that the present brochure will neither be unacceptable nor useless. Its object is not to supersede the advantage of legal assistance, but to inform the client of the nature of his rights, and to aid him with direction in seeking for their support and justification.

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THE

NATURE AND LAW

OF

REAL PROPERTY.

CHAPTER I.

REAL PROPERTY LEGALLY AND SOCIALLY CONSIDERED.

Of all the subjects connected with his social relations, which can occupy the thoughts of a member of society, there are none so extensive and intricate, and few more interesting and important than the nature and mode of government of real property. Forming, as it does, the substance, or substratum, of all those means by which comforts are to be derived, or on which wealth is to be founded, the ramifications of its influence naturally extend into every department of the state. No human being is unaffected by it, however lofty or however low may be his condition among his fellows; and just in proportion as it is wisely divided, safely secured, and rightly transferred, will be stability, and, in a great degree, the prosperity of the realm. All, it is true, do not possess real property; but all immediately, do

more or less remotely, are benefitted by its possession. It naturally assumes a variety of appearances; and just in proportion to the success of men's ingenuity in giving a character of permanence to their attainment of worldly goods, is the extent of that variety; for perpetuity, or comparative perpetuity, is the essence of real property.

This is the main difference between real and personal property, that, whereas the latter is of a more shifting and perishable nature, and can in general be with ease transferred from place to place, the former has the converse of these attributes, and cannot in any way be removed from the place or thing from which it is derived, or in which it consists, though the certificates and vouchers for it may. Nor can the proprietorship of it be altered with the same facility as is the case with personal property; for, being of a more enduring kind, and for that reason, if for no other, it has ever been deemed, that the transference of it should be attended with more of solemnity and dignified form. Being such that it cannot be passed from hand to hand, the presence or subscription of attesting witnesses has been made requisite to the validity of the instruments by which it is conveyed, while the deeds or instruments themselves are required to be more specific in their terms than is the case with others relating to less enduring affairs.

The consequence of all this has been, that the law by which this property is governed has become more varied, and extensive, and intricate, than any

other. More depth of intellect has been necessary to constitute it, and greater acuteness has been evinced in its elucidation, than in any other department of legal science. Deriving its body and existence from the several people who have at different times held dominion in this country, the law of real property has partaken of all their different characteristics; and neither the nature of the property itself, nor of the law by which its possession and transfer are ruled, can be rightly understood without some knowledge of the sources from whence it has been derived, and we will, therefore, in the next chapter, briefly review the rise and progress of the legal system of the country, especially of the tenures of property, and show, by the process through which the domain has come to its present condition, how the points and rules of its legal government have been developed at the several periods.

CHAPTER II.

THE SETTLEMENT OF PROPERTY.

In no country has the nature of property, and the institutions by which it is governed, been more affected by the character and customs of its inhabitants, in a remarkable degree, than in England. Almost the whole of the data by which the judges in our courts

of justice are directed in their decisions are derived in reality, or referable in principle, to customary usage, known and followed in periods anterior to any national acknowledgement of statute or written laws. For though through the complexity of the present state of society it is matter of absolute necessity, for the satisfaction of the people, the preservation of liberty, and the equal administration of justice, that we should have laws precisely laid down for the government of affairs, and fixed in written words, yet none of these laws can be, or at least are, constituted or administered contrary to the known custom of the country. These customary usages which obtain, of legal effect, are known by the name of the COMMON LAW of England, and the written, or STATUTE LAW, does no more than explain, or extend, or affirm, that common law. Statute law, indeed, deriving its powers from the evident and apparent authority of legislative enactment, may seem to some to be endowed with higher avail; yet, upon examination, it will be found not to be so, or to contain in it any farther elements of freedom in consequence of being established through the consent of the representatives of the people; for if the statute law has been erected by Parliament, the common law has arisen by universal assent, and the immemorial usage of the people at large.

It is not certainly known by whom these islands were originally peopled; but it seems to be pretty clearly ascertained, that they were a race, of a character far superior to that which has been ascribed to them;

and instead of being driven, as has been generally supposed, into some few fastnesses or nooks of the country, became largely amalgamated with the subsequent incomers, impressing, as well as receiving, national characteristics, and transmitting many of the principles of their social government even to the present day. The Saxons were those with whom the ancient Britons were most largely incorporated; and though differing materially, in language as well as several other important particulars, they yet appear to have been intrinsically the same people; and though their superstitions might be different, the principles of their legal institutions were certainly not very remote from those which prevailed here prior to the alloy of the Roman jurisprudence.

From them we have derived some of the purest and noblest of our privileges; and though we cannot positively assert that this or that has been derived from the Britons, the Saxons, or the Romans, or the Danes, we have authentic data to show that it was among the Anglo-Saxons that the best of our customs were established. King Alfred, one of the most perfect characters that ever existed, soon as leisure was afforded him by the cessation of the piratical incursions of the Danes, turned his attention to the consolidation of the several laws which prevailed in England, and comprised them in his celebrated code under the title of the *West-Saxon Lage*, as given in his *Dom-Boc*, or *Liber Judicialis*. The subsequent Danish conquest tended terribly to depreciate this noble fabric of useful

principles; but, shortly after the expulsion of the Danes, the English returned to their ancient usages, and King Edgar attempted to condense the three systems held in the great divisions of the country, the *Mercian Lage*, prevailing in Mercia, and the *West-Saxon Lage* of Alfred, with the *Dane Lage*, or laws left behind by the Danes, into one code, a design which was afterwards completed by his grandson, Edward the Confessor, comprising also in it several improvements, which experience and additional wisdom had suggested.

By this compilation, as well as from other sources, we learn, that the principle of feudality, though in a much milder form than that which afterwards prevailed under the Norman kings, had always obtained in England,—so far at least as to the acknowledgement, by the holding of lands or other real property, of a superior. This difference, however, held, that whereas under the Normans the principle of tenure was the rendering some known and ascertained, or indefinite services by the proprietor *de facto*, or, as he is technically called in law books, the *tenant*, under the Anglo-Saxon rule the lands possessed by the *sokemen*, or freemen, were *allodial*, that is, possessed by personal or hereditary right, without reference to any superior lord except the king or sovereign from whom it was presumed they were originally received. This nature of holding partook of the general freedom of the institutions of the realm at that period, and laid the foundation of the *freeholds* of the present day. Yet, though thus generally free, the country still had the disfiguring blot of

slavery; for, attached to the soil, were a portion of the people designated *cerfs*, or *ceorls*, afterwards known under the name of *villeins*, from the *villas*, or villages, in which they resided; for they were invariably predial servants, and consequently seldom or never found in towns. These villeins, again, were divided into two classes, one possessing greater privileges, and holding a superior grade to the other. The former being entitled to the enjoyment of certain profits of the land on the performance of certain services, while the latter appear to have been altogether in a state of complete bondage. But the whole principle of possessing and deriving property was entirely changed by the introduction of the feudal system by the Normans.

As the several tribes who poured in such multitudes on western Europe, previous to and shortly after the Christian era, gradually progressed in their way from the north and east, they settled in different communities in the several districts on the lands which they acquired, and, in reward for the services of his followers, it was the custom of their chiefs to grant to them respectively plots of ground, or portions of territory, on condition of their rendering him assistance in time of war. These grants were termed *feodal* fiefs, or fees, this latter word signifying a conditional stipend, or reward. As society improved, and these chiefs became nobles, inhabiting castles and strong holds, it was usual for them, after granting out the district, to apportion a parcel of land for the pleasure or subsistence of their own household and this land was given out to another species of ten-

ants, who, after supplying the necessities of their lord, could reap for themselves. But while the feudatories held their lands generally for life, these lower class of holders held only from year to year, or were removable at pleasure.

No where did this principle of feudal tenure prevail more strongly than in France, which country, shortly before the accession of William of Normandy to the English throne, had universally, though gradually, adopted it. That warlike monarch, though he granted large territories to his barons and retainers, does not appear to have attempted to establish the custom of his country with regard to property immediately on his arrival. But it was gradually introduced by his more powerful followers, in leasing out the lands with which he had endowed them, and at length was generally received by consent of the Great Council of the nation, some considerable period after his title had been confirmed. In the nineteenth year of his reign, an invasion being apprehended from Denmark, and the military rule of the Saxons having been laid aside, the country was found to be utterly defenceless, and the king brought over a large army of Normans and Britons, who greatly oppressed the people upon whom they were quartered. This induced the nobility to listen to the remonstrances of the king, for putting the kingdom into a proper state of defence. In consequence, the compilation of *Dooms-day* Book, or great survey of the estates of the country, was undertaken, which was finished in the following year. And, im-

mediately afterwards, all the principal landholders, having met the monarch and his nobles at Sarum, submitted their lands to the king, and received them of him again as his feudal retainers.

The result was, that he became by presumption lord of all the soil in England, and no man could possess any property except as a fief or dependency, mediately or immediately, of the king. There were, however, some exceptions. The county of Kent especially, strenuously and daringly resisted every attempt to change their ancient customs, and at length proved victorious in retaining them; while some places also in other parts of the kingdom either resisted or evaded the general rule, and retained usages peculiar to themselves. The system retained in Kent was termed *Gavel-kind*, while that in other places was called *Borough English*; the influence of both having reference to the inheritance of property, as we shall presently more particularly show.

There was a regular plan of subordination introduced into the country, the effect of which was to render every freeman who before had held his lands of personal right, the vassal or dependent of some superior lord; and it became out of his power to sell, exchange, or in any way dispose of his lands, without the consent and licence of that superior. In return for this subserviency, the lord was bound to afford protection to his dependent, and was equally unable to transfer his right of seignory or lordship without the consent, or, as it was called, the *attornment* of his

tenant. In this way a compact was established for mutual benefit, and such the old denizens of the country considered it, liable also, indeed, to their services for the general defence of the realm. But the finesse of the Norman lawyers so far stretched the principles of feudation, that the original freedom of England became absorbed in the new system. They made every acre, over which they could exercise an influence, subject to a variety of imposts; and the attempt of a feudatory to transfer his property, so as to retain any power over it himself, such as his lord retained over him, was resisted and overruled, and infeudation, as it was called, was ultimately abolished, by the transference of the feudal service from the disposer to the buyer of the property.

Nor was this the least of the evils attending the change, for as the principle of the system was the rendering warlike service, it was clear that grants of land could only extend for one life; for, however able and competent to render such service the present tenant might be, it was impossible to say positively that his children would be as able as himself, and the lord therefore retained the right of again granting these lands to whomsoever he would, at the death of the present holder. It occasionally happened that they were transferred to strangers; but it appeared so consistent with natural reason that the heir, if equally able with others to render knight service, should be preferred and enter upon the lands held by his father, that it at length became usual for him to do so,—the

lord taking a certain sum, or fine, as a licence for his entrance on the property.

But there were other lands, which were held upon a different service than that of war; and the English, who ever retained a fondness for their old rights, gladly laid hold of any means whereby they might resume them, either in reality or resemblance, and they consequently soon allotted lands to be held also for services of a peaceable kind: some, indeed, without rendering any service at all, except the acknowledgement of fealty to the lord. The tenures by which these lands were held were called tenures in *free socage*, and were possessed by such persons as had either never been deprived of them, as was the case in Kent, or had never been compelled to change them for the apparently more honourable, but far more burdensome, right of knight service. They were the origin of the freeholds of the present day.

Besides these species of titles to property, there was another called *tenure in villenage*, which was again divided into tenures of *pure* and *privileged villenage*. In the former the holder was bound to anything required of him by the lord, of whatever extent or character. The service was uncertain, and generally base or menial, consisting frequently of the execution of all the duties which contributed to the comfort of the lord's household,—such as would naturally devolve on the successors of the *the women*, — who were a class among the Saxons, in a state of absolute slavery, who could neither hold nor inherit property, but were, in

person and goods, at the absolute command of the party who owned them,—being generally individuals who had forfeited their birthrights by crime. But as the process of time ameliorates every kind of punishment, so the feudal system tended to alleviate the condition of these individuals, by gradually admitting them to fealty, which, as a natural consequence, made them free. From this class of pure villeins have sprung our present copyhold tenures, or tenures by copy of court roll.

The kind of privileged villenage was such as was liable to certain specified services. These parties were the descendents of the *ceorls*, or *cerfs*, of Saxon times, who possessed a qualified freedom, but could hold no freehold in their lands. So long as they performed the services comprised in their duty, they could not be dispossessed of their holdings, of which the right of property, however, lay in their lords. They were the origin of the customary freeholders of the present day; that is, of those who hold their lands by copy of court roll according to the custom of the manor, which, and not the will of the lord, has immemorially prescribed their services.

There was, however, another species of tenure, which was called *tenure in frankalmoign*, occasioned by the free gift of property by individuals for the use and support of the church. In the act of endowment, certain services were specified; such as to pray for the souls of the donor or his family,—but not any specified amount of services,—and they did, therefore, no fealty

for their holdings, for their homage was rendered, in the service prescribed, to the Divine Governor of all things. It is upon this tenure that most of the cathedral, monastic, and other ecclesiastical corporations held their property, and do so still, the nature of the service being changed at the reformation, and made conformable to the pure doctrines of the Church of England. There is this peculiarity about it, that, in the event of the neglect of the service, the law gives no remedy against the parties who are guilty of neglect to the lord of the lands holden; and they are only punishable by the *visitors* appointed to supervise them.

Tenure in frankalmoign differed from a similar, but different, holding called *tenure by Divine service*, in that the latter had a certain prescribed duty to perform; and, in the event of neglect of that duty, the lord could distrain and sue out his remedy by law. Such donations, however, are now out of use, having been abolished by a statute of Edward I.; so that none but the king can now grant lands to be holden by this tenure.

From the nature of things, it frequently occurred that the feudatories, whether *tenants in capite* as the feudatories who held directly of the king were called, or otherwise were unable to manure or cultivate their lands, or attend properly to them, consistently with their military duties. They therefore, committed part of them to inferior tenants, who gave cattle, corn, or money, as *reditus* or rent for the lands they held. These inferiors were, like the original holders, com-

pelled or required to do suit and service for the lands they held; and, to the best of their abilities, promote the welfare of their superiors. The convenience of this arrangement was soon felt, and speedily began to prevail throughout the country, directly breaking down the purity of the principle of holding lands by military service. Feuds began also to be bought and sold, so, that at last, all the land of the kingdom was brought at last under the common character of a civil possession with civil rights.

Yet these changes by no means barred or prevented the oppressive exactions of the Norman lords. The feudal system had introduced a series of charges upon the property held by the feudatories of a most oppressive character, which, however, modified by the charters granted by Henry I., King John, and Henry III., and by advantages subsequently obtained from other sovereigns, still possessed much of their original hardship, until, at length, James I., for a proper equivalent, benevolently abolished them altogether. And, though the plan he devised was not precisely followed out, it gave a blow to the system, which fitted it for discontinuance during the usurpation of Cromwell, and also for its ultimate extinction, by the 12 Car. II., c. 24. This act decreed, "that the court of wards and liveries and all wardships, liveries, primer seizins, and ousterlemains, values and forfeitures of marriages by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knight service and escuage; and also

aids for marrying the daughter and knighting the son; and all tenures of the king *in capite* be likewise taken away. And that all sorts of tenures held of the king or others, be termed into free and common socage; save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand sergeanty." Thus, was the whole of this most oppressive and burdensome system, at once done away with; a "boon," says an able writer on Real Property, "which was a greater acquisition to the civil property of this kingdom than even *Magna Charta* itself; since that, only pruned the luxuriances that had grown out of the military tenures, and thereby preserved them in vigour; but the statute of King Charles extirpated the whole, and demolished both root and branches."

Though most of the tenures of the country were thus changed in character as well as name, the statute did not abrogate the customs held valid at common law, such as that of *gavel-kind* in Kent, and *petit sergeanty*. Indeed, it appears to have reference only to such things as were oppressive, leaving others untouched; and, therefore, did not, by any means, induce a general uniformity of principle applicable to all circumstances by which property is held. But, it is not necessary that we should now state the nature of all tenures, for a reference to our previous observations will sufficiently explain most of them. Some of them, however, require elucidation—*petit and grand sergeanty, burgage tenure, gavel-kind, and borough English.*

Grand sergeanty signifies the holding of an estate by the performance of some honourable but not burdensome duty, such as that of cup-bearer to the king, of champion at his coronation, or other equally honourable office. *Petit sergeanty* bears a close resemblance to grand sergeanty, being the rendering of a trifling acknowledgment or rent, instead of the performance of a service, such as the yearly presentation of an arrow, a sword, or a lance, or anything of a similar kind. It was in effect, a tenure of free socage, only not being liable to any predial or base services, but being held of the king, was called petit sergeanty, or *parvum servitium regis*. *Burgage tenure* was similar to a tenure in socage, only the former referred to houses, whilst the latter related to lands.

Gavel-kind was a tenure of a peculiar kind, prevailing in Kent, and supposed by Mr. Selden to have obtained throughout the country previous to the conquest, but retained only in Kent through the most daring and strenous opposition to the Norman impositions. Its distinguishing properties are numerous, some of the principal being (we again quote from our previous authority); "1st, The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen; 2nd, The estate does not escheat in case of an attainder and execution for felony, their maxim being 'the father to the bough, the son to the plough;' 3rd, He had power of devising lands by will before the statute for that purpose was made; 4th, The lands descend not to the eldest, youngest, or any one

son only, but to all the sons together, which was, in deed, anciently, the most usual course of descent all over England; though, in particular places, particular customs prevailed. These, among other customs, distinguish this tenure in a most remarkable manner; and yet, it is said to be only a species of socage tenure, modified by the custom of the country, the lands being holden by suit of court and fealty, which is a service in its nature certain; therefore, by a charter of King John, Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavel-kind tenures holden of the see of Canterbury into tenures by knight-service; and, by statute 31 Henry VIII., c. 3, for disgaveling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future, *like other lands, which were holden by socage.* Now, the immunities which the tenants in gavel-kind enjoyed were such as we cannot conceive, should be conferred upon mere ploughmen and peasants; from all which I think it sufficiently clear, that tenures in free socage are in general of a nobler original than is assigned by Littleton; and, after him, by the bulk, of common lawyers." To which we may also add, that of such tenacity is the custom, that the acts which have been passed to disgavel estates, or render them descendible according to common law, have only availed to alter the partible quality of this customary descent, and do not alter the other incidents of the tenure; and notwithstanding the extent of some of these statutes, lands in Kent are

always presumed to be of this tenure until the contrary is proved. Tenure in gavel-kind also availed in Wales until repealed by 34 Henry VIII., as well as in Ireland, where it was for some time made applicable to the estates of Roman Catholics in that country, who did not conform within a limited period, but the rule is now altered. Several derivations of this term have been given. Sir Edward Coke supposed that it arose from the words *gave all kind;* while others have drawn it from the Saxon word *gavel,* rent, that is land which gave rent. The custom of gavel-kind holds also in the parishes of Stepney and Hackney.

Borough English is a custom which was retained in several places in England at the time of the Conquest, against the general rule, of lands descending to the youngest son instead of to the eldest. The reason assigned for this apparent injustice is the custom which certainly prevailed in Scotland until abolished by Malcolm III., and which was rumoured to exist in England, of the lord having a right to sleep with the brides of his dependents the first night of the marriage, and occasioned the supposition, that the eldest son might not be the legitimate heir to the property. Judge Blackstone, however, thinks it not improbable that the custom may be derived from the Tartars, who are stated by Duhalde to have the same usage, and assigns as a reason for it, that the eldest and other sons being provided with herds as they came to maturity, leave their father's house in search of an establishment for themselves, and so, the youngest

son, who remains at home, becomes the natural heir to the property.

We have only to observe with regard to this part of the subject, that under the feudal system, and indeed prior to its enlarged existence in this country, that in the conveyance of lands, the mode of investiture was by what was called *livery of seizin*. This was an open declaration on the part of the prior owner of lands and property, before competent witnesses, that the new proprietor was rightly entitled and possessed of it. Sometimes this was made more emphatic by the delivery of a turf or small portion of the soil.

We will now consider the nature of real property, in what it consists, how a person becomes seized or possessed of it, by whom it can be inherited, and the law of its inheritance, acquirement, and possession.

CHAPTER III.

NATURE OF REAL PROPERTY.

REAL property is said to consist of two parts; the matter or thing of which the property is composed, called technically *realty*, and the value derived from it, which in truth constitutes the property.

Realty is usually divided into three parts:—LANDS, TENEMENTS and HEREDITAMENTS.

Land includes every thing of a permanent nature, and comprises all things upon the surface and attached to the soil of the earth. Comprehending, therefore, in its

legal signification, "any ground, soil, or earth whatsoever, as arable, meadows, pastures, land covered with water, described as such,* woods, moors, marshes, furzes, and heath, It legally includeth also all castles, houses, and other buildings, for they consist of two things,—land, which is the foundation, and the structure thereupon. So that if I convey the land or pond the structure passeth therewith."

Tenement has a larger signification than land, including not only all those things of inheritance of a corporeal or substantial kind, but also all benefits issuing out of them, *not lying in livery*, as it is called; viz., rents or other profits derivable from land. "Thus, an advowson, a franchise, an office, a right of peerage, a rent-charge, are all, legally speaking, *tenements.*" The term has also been applied to feudal tenures, though in a confined sense, and has been used by the legislature to express that which it means in the popular acceptation, viz. a habitation, with its appurtenances.

Hereditaments has a still more extensive signification than either; including not only real estate, but in some instances merely personal property, and even the bare rights which may descend to a man from his ancestor. It includes in fact every thing that may be obtained by descent, let it be of whatever nature it may.

These three terms, including all kinds of realty, are again divided into *corporeal and incorporeal he-*

* The description of a pond or piece of water, in a deed of conveyance, as water would merely pass a right of fishing.

reditaments; the former including every thing of a substantial nature, and the latter every thing of right or benefit issuing out of the former.

Corporeal hereditaments may be confined to the designation *land*. Incorporeal hereditaments are also *tenements*, being included in the Statute of Uses, a statute passed in the 27 Henry VIII., for the purpose of obviating a great defect in the administration of the law, arising most probably from feudal tenures, whereby it was supposed that all the land in the country, to whomsoever it might belong, was not *bonâ fide* the property of the individual who possessed it, but was held by him for the *use* of some other person; and may be therefore conveyed by either grant, bargain and sale, covenant to stand, seized or by lease and release, provided the right is in existence at the time such conveyance is made. "But a grant is the assurance by which hereditaments are appropriately conveyed, as by a grant, nothing passes but that which the grantor is legally entitled to convey. If, therefore, a tenant for life or years of an advowson, common rent, remainder, reversion, or other incorporeal hereditament, grant the same in fee" implying for a permanence—"this will not occasion a forfeiture. In this indeed consisted the great legal distinction anciently prevailing between corporeal and incorporeal hereditaments, that the former were said to lie in livery, the latter in grant." The distinction arose from the circumstance that formerly it was the custom to convey land or any corporeal hereditament by the open delivery of a part of the soil, a turf, or some portion of the estate,

or else by passing it directly to the hands of the purchaser before witnesses, in whose presence he was formally put in possession. This was called *livery in seizin*, or a delivery by which the purchaser became seized or possessed of the property; and all property that could be so delivered was said to *lie in livery*. Whereas it is plain that a thing which could not be held in the hand, which was not properly tangible, could not be conveyed but by writing, and consequently a deed was necessary to render its conveyance palpable. Circumstances have, however, done away with the distinction; and by the Statute of Frauds, passed in the 29th Charles II., a descendible estate in lands, where the interest is of longer continuance than three years, requires a deed to make its conveyance valid.

Upon these subjects estates are said to be founded; the word, in its enlarged sense, comprising the whole of them, lands, tenements, and hereditaments, so that if in a deed the word *estate* only be expressed, it implies the whole of his interest in the property specified by whom it is conveyed.

Real property has been divided into corporeal and incorporeal hereditaments, and again:—

Corporeal Hereditaments have been divided into houses, out-houses, mills, gardens, and orchards, yards and courts, areas, curtilages, preserves, warrens, decoys, rivers and sewers, ports and harbours, fisheries and railroads, bridges, turnpike-gates, rectories, churches, monuments, fences, woods and trees, mines, manors, and land.

Incorporeal Hereditaments are divided into rents, annuities, tithes, advowsons, seignories, manorial rights, commons, casements, offices, dignities, and corodies.

CHAPTER IV.

CORPOREAL HEREDITAMENTS.

For the sake of easy reference we have arranged the heads of corporeal hereditaments in alphabetical order and therefore take as first,—

Areas resemble yards and are always enclosed, and persons found therein for an unlawful purpose, are consequently liable to punishment as a vagabond, Stealing the fence or breaking it for that purpose, is felony; but breaking the fence without intent to steal, is not felony.

Bridges, according to the nature of the way continued by them, are public or private property; but where a bridge has been built by private individuals, and the soil whereon it stands also is private property, though the bridge may be dedicated to the public service, and the right of way over it goes to the public, yet, the property in the bridge continues in the builder, and he may bring an action of trespass for injury done to it. By the act 22 Henry VIII., c. 5, it was decreed that the inhabitants of every county, riding, city, or town, were bound to repair the public bridges lying within their precincts, or so much of them as did so; it is only necessary, therefore, to

prove on an indictment for not keeping any bridge in repair that it *did lie* within such particular precinct, and that it was a public convenience, the defendants being bound to prove their discharge from the duty. Both corporations and individuals may be liable to such repairs. The owner, however, of lands on both sides of an old bridge, or of a new one built by him expressly for the public convenience, or which, subsequently to its erection, becomes a public convenience, is not liable for the repairs, but they must be done by the county; and the same principle holds on the alteration of a bridge, where any benefit accrues to the public. An inhabitant of the place where the bridge is situate may, on a trial, become a witness. The Larceny Act also applies to the materials of bridges.

Churches are divided into cathedrals, and parish churches, and chapels, according to the size of the cemetries attached to them; though, for a place to become a cathedral, it ought to be the chief church of a bishop's see. The difference between a church and chapel is, that the former has a place of burial attached to it as well as a right of the sacraments being administered there, which the latter has not. The incumbent of a church, whether rector or vicar, possesses a life estate only in the property as to anything that would prejudice his successor, though otherwise, he is reputed to hold it in fee; and he may, therefore, dispose of the profits of the churchyard to a tenant, or convey a freehold right of burial

either in the church or church-yard, by deed; and, as he is sole proprietor, he can prevent any one preaching in his church without his permission, and bring an action of trespass for infringement of his right, either in the church or church-yard. In legal proceedings, the description of a church, by its usual appellation, is counted a sufficient description. All places of public worship are exempted from poor rates. Any one disturbing a minister during the celebration of divine service is guilty of a misdemeanour, and may be punished by imprisonment. But, though a rector or vicar have nearly supreme authority in his church, and the entire control, except where he has demised any thing or right by deed, he cannot remove the coat armour, or pennons, or other ensigns of honour, which have been hung up there.

Curtilages are parcels of ground lying near to or about a house enclosed by the *general* fence; but no building within the curtilage, not occupied as a *dwelling*, is deemed part of such dwelling for the purpose of burglary.

Decoys are places set apart for the resort and taking of wild fowl; and for any injury or trespass thereon, the owner has an action against the party committing the default. Peaceable uninterrupted occupation of a decoy for twenty years, establishes a freehold possession, and the owner has a right of action against any person doing aught to its injury, whether it be to the fowl upon it, or any act near it tending to frighten them away from it.

Fences may consist either of a hedge, or ditch, or both. If it be a ditch, the parties owning the land respectively on either side of it can claim, in the absence of specific proof to the contrary, to the middle of the ditch. If the fence consist of a hedge, ditch, and bank, they are considered the property of the party on whose field they stand; for he who has formed the ditch and bank, it is presumed, in the absence of proof to the contrary, would, as he had no right to do otherwise, dig out of his own earth, and throw the mound up on his own side; and the ditch and bank, therefore, are held to be part of the close or field where they lie. Where there is a ditch on each side of the hedge, the ownership of the hedge must be proved. A tenant is required to preserve the boundaries of the land held by him. Should the fence, however, consist of a wall, there not being *primâ facie* evidence of the construction of the fence, in consequence of the materials of which it is built not being got, palpably, from the spot, he who is bound to repair it is considered proprietor. But where no such circumstance exists, the common users of a wall, apparently built equally on the lands of both, are joint proprietors. Where, however, the Building Act, 14 Geo. III., cap. 78, applies the wall follows the custom of the land upon which it stands. Parties upon whom the repairs of fences lie, are liable to actions on the case for neglect, and the plea of insufficient funds in the case of a public body will afford no defence.

Fisheries—A private or several right of fishery im-

plies an exclusive right of fishing in the waters intimated, or a right greater than that of others, though not probably exclusive; and, by a grant of the soil on which it is placed, possesses, a corporeal right; and the party obtaining it is enabled to bring an action of ejectment in support of his right. Actions may also be sustained for abstracting water from a fishery, or doing other wilful damage to it. Any trespass, by breaking down or destroying dams in fish-ponds or other private property, or by throwing in lime or any other noxious substance, to destroy the fish, is punishable by seven years transportation, or two years imprisonment and whipping, if the offender be a male. In the same manner, the law also protects oyster beds against any one taking, or attempting to take, oysters, even though he fail in doing so; the punishment being a fine of five pounds, or imprisonment for three months with whipping, or, perhaps both.

Gardens and orchards, including both private garden grounds, and those used for trade, are corporeal hereditaments, and may be defended by action of ejectment—one of the main benefits to which real property is entitled,— any one may therefore be precluded from entering them for the purpose of making a highway, or of searching for minerals where the land has been appropriated to the purpose for any sufficient length of time, as for six years. Nor can a tenant, either during tenancy or at its expiration, remove any plants, trees, shrubs, or flowers, nor destroy strawberry beds which are likely to continue bearing,

unless the grounds are let to the tenants for the purposes of trade.

The term *Houses* includes every species of dwelling, not excepting a cottage, though in a conveyance a cottage has a narrower signification, and implies a small house without any land. The word mansion includes not only a dwelling house, but also, any outhouses which belong to the mansion, though they do not adjoin it. A *messuage* is the same as a house, though it was formerly conceived to carry lands, or at least out-houses and a plot of ground along with it; but this interpretation has been overruled, and so a conveyance of a messuage passes all under the same roof which has not been separated from it, and occupied differently for several years. But the expression of a messuage *with appurtenances* will pass fixtures usually removable, unless they are parted from it before the execution of the deed.

Land is the general name for all property of corporreal hereditament, and therefore in actions of ejectment, wills, and conveyances, it is not necessary to specify the particular kind of land pleaded for, demised, or passed. Possessing a fixed and determinate boundary, the owner of a piece of land is entitled to be free from every nuisance from neighbouring property that would injure or inconvenience him by a protusion on his demesne. Consequently, no person has a right to incommode his neighbour by fixing any thing that shall extend or hang over adjoining property, as the branches of trees which may cause da-

mage by continual dripping, a spout through which the water runs upon a neigbour's land, or even firing off a gun from a highway, whereby the shot passes over his land. Nor can any one drive a level from his own land into a neighbour's mine. For all these and such things an action of trespass may be brought. Land left suddenly by the sea belongs, in the first instance, to the crown, but it is by prescription ascribed to the lord of the manor, as is also the land on the sea-shore between high and low water-mark, and he can consequently prevent any one from fishing or bathing there, or digging stones or gravel therefrom. Wherever however the sea has gradually receded, the land thus acquired becomes *de facto et de jure* the property of the owner of the adjoining property. The term land signifies every thing on the surface, and consequently, as we have before stated, a conveyance of land will pass all that is upon the surface; and, if the devise is expressed without limitation, it has the effect of passing the fee simple. Property left by a testator to be changed in its nature as land to be changed into money, or money into land, is considered, to be of the quality of the matter into which it is to be changed, and descends, or is acted upon, accordingly; and whether the business be finally accomplished or not, as whether money covenanted to be paid for land, is about to be paid, but is not paid, or when land is agreed to be conveyed, and is not conveyed, the principle is in no way invalidated.

Thus the real estate of a testator becomes a

personal, or a personal estate a real estate—unless the devisees elect, which, if they choose, they can do, with regard to the former at any rate, to take the property in its original character. By the statute of 3 and 4 William IV., c. 74, s. 71, lands so directed to be sold for the purchase of other lands, if not specified as copyhold, to be dealt with as freehold; but if stated to be copyhold, then as copyhold. If the fund be constituted of money, whatever be its amount, if directed to be laid out in land, it is to be treated as freehold land; but leaseholds for years are to be treated as personal effects.

Manors are considered as real property and a corporeal hereditament. In order to constitute a manor it is necessary that there should be a demesne with a court baron in which at least two suitors can appear. But a manor may become extinct by the separation of the demesne lands, from the seignory, and the consequent loss of suitors to the court, and it then becomes a reputed manor, and loses its property of realty. Neither a manor nor its fines and quit rents are subject to rates for the poor. Should there be an enclosure of common lands, the lord of the manor is entitled to a share for his demesne lands, as well on account of his manorial rights. He has exclusive right to the game on the waste lands of the manor, but cannot enter upon the enclosures of the freeholders and copyholders in pursuit of game without their license. As he also is entitled to the chattels of the lordship, he is the *primâ facie* proprietor of all estrays and wrecks before seizure.

Mills, when annexed to a freehold, are corporeal property, being rated to the relief of the poor, and conferring a settlement; though if a mill be not so connected it becomes merely a chattel personal.

Mines belong to the owner of the land on which they are opened, with the exception of gold and silver mines, which come, by prerogative, to the crown. A tenant for life cannot open mines like a tenant in fee or in tail, unless impeachment for waste is avoided, but may continue to work those which have been already opened, without any liability for damage. A coal-mine is property of a compound kind; and the same rule does not apply to it as to other property, that a purchaser shall have possession from a certain quarter-day, but the time specified should be a certain month or week according to the custom of taking account of the profits of the mine. Poor rates are levied on mines and collieries according to the rent at which they would let to a tenant otherwise uninterested in them. Stealing property from a mine or colliery is punishable as felony. Firing a coal-mine, or breaking or destroying machinery connected with it, is made a capital offence. Drowning a mine, or destroying any part of it, or any thing attached to it, is felony, punishable with seven years transportation, or two years imprisonment and public whipping.

Monuments are considered as heirlooms, and go to the heir, and not to the executory devisee, and cannot, therefore, by possibility, be devised away from the heir. But he has no property in the bodies or ashes

of his ancestors; and, consequently, is unable to bring a civil action against any one who violates or disturbs their remains; an anomaly in the law, which would be well corrected; and, it is a happy thing that the custom and feeling of the country have rendered such an offence almost as odious as sacrilege. The right of burial in a church or church-yard is obtained by prescription, or grant of faculty from the bishop or other ordinary. In the former case, the right can only be enjoyed so long as the family continue parishioners. But, though a parishioner has not obtained a right, either by purchase, or otherwise, to burial, in any particular place, the incumbent is bound to bury him somewhere in the church or church-yard. Inscriptions on tombs or monuments are admitted as testimonies of descent.

Out-houses are buildings adjoining or standing near to dwelling-houses, and under the term are included all the buildings erected apparently for one object, the use of one individual, within one enclosure, or comprised in one specification of rate, but does not include any building standing apart and away from the dwelling-house, out of sight from it, and not *necessarily* connected with it, such as a cart or wagon hovel in a field, though at a small distance; nor is a mill considered as an out-house.

Ports and harbours are, in fact, vested in the crown, but they are also frequently vested in trustees by act of parliament, who are then seized of the property, and competent to maintain actions for damage. Should

the party, however, bound to repair, neglect to do so, a third party may repair, being, however, required to give notice before hand to those by whom it ought to be effected, and then he may recover the costs of his suit and service.

Preserves are portions of ground appointed for the breeding of game, and any person maliciously throwing poison into them, for the purpose of destroying the game is punishable by a penalty of five pounds. But no action lies against any person who, by shooting on his own ground, may frighten away the game, though it does the moment he sets foot within a preserve. Nor does any indictment for conspiracy lie against any two or more persons to enter a preserve, for the law acknowledges no particular privilege to private grounds, but an action for trespass must be brought for punishment of the wrong doer on this account.

Railroads are governed by the acts of parliament through which they are made. The soil on which they are formed, together with the specified width on either side, belongs to the company; and the proprietors can, consequently, maintain an action of trespass, are entitled to vote for members of parliament, and are liable to poor-rates, on account of them. The Malicious Injury Act extends to them as does also the Larceny Act.

Rectories are considered as real property, as they comprise a church, land, and tithes, which are tangible things, though the last would come under the

appellation of incorporeal hereditaments, and the land may consist of the church and church-yard only. A rector is bound to suffer no wilful waste, that is, no undue dilapidations. Thus, an action will lie against his executor if the fences of the glebe are left in a state of decay; or, if trees shall have been felled thereon, which were necessary for the advantage of the living. But no complaint can be made for want of a sufficient cultivation of the soil. An action may also be brought for defects by an incumbent against his predecessor who has ceded or given up the living; and the party bringing the action is not compelled to sue out all his rights under it on suit, but he has separate rights for every different dilapidation; and, that, not only against the preceding rector, but any one to whom that party may alien the property. The money recovered, however, must, within two years, be laid out upon the buildings which had been suffered to decay, under penalty of double the amount recovered. The repairs to which a rector is subject are simply those of a substantial kind, for he is not bound to any thing of an ornamental character, such as painting; either to chancel or parsonage; every part of the property of the living coming under the same rule.

Rivers, if they be not navigable, are equally held by the proprietors of land on both sides, the line of demarcation being the middle of the stream. If one person owns the lands on both sides he is entitled to the soil of the whole river, and is consequently liable to poor rates for the same, after the same rate as

would be charged to a tenant who hired the water, and can bring an action of trespass for doing injury either to the banks or water. But if a river be navigable it constitutes a highway, authority over which is vested in the king. A party, however, who apprehends any mischief to his estate through the overflowing of a river, may erect a mound or other stoppage to the water; but if it cause the body of the stream to go out of its accustomed course, by which the weight is thrown on the banks of lands which are the property of others, or if it withdraw or tend to withdraw the river from its accustomed channel, or if it impede the navigation of it in any way, whether by reducing the bed of the river and making it too shallow, or otherwise, he is liable to an action for trespass. Shares in navigable canals where the soil of the stream is vested in the company, confer a right of real property, subjecting the owner to rates for the poor, and entitling him to vote for members of parliament. But such principle does not hold where the Company are incorporated by act of the legislature, or where there is only a right of navigation and no title to the soil of the river, and this although they may have erected a dam in the river. It is also established that persons enabled to make and maintain a navigable river, have no right to the soil in either of the banks formed to line it, though the earth be taken from the bed of the river. Commissioners of sewers, however, differ in this, that they are enabled to acquire a definite property and constructive possession in all land and

works formed by them, as also to bring actions under the general appellation of comissioners of sewers, without specifying their names A grant of water does not include the land on which it stands, except in the case of salt pits or springs, where the interest of the owner is measured *by bullaries* or buckets of brine, but an ejectment or tresspass lies against any person upon ponds or pits of water, for the expression intimates an ownership of the soil. Locks and other conveniences on rivers or canals are for public benefit, and are therefore protected by the authority of the king according to statute.

Turnpike Gates are considered as real property when attached to realty, and may be sustained as such by act of ejectment. When the right of toll is questioned, an old deed, between a public body claiming it, and other parties, regulating the payment, will establish the right; and so verdicts respecting tolls, are evidence as to the same tolls between other parties. Throwing down a turnpike gate, or any thing connected therewith, is punishable as a misdemeanour.

Warrens are parcels of land used and set apart for the breeding of hares and rabbits, which are protected like all property of a similar kind by the Larceny Act. Any person unlawfully killing hares or rabbits, in private warrens, is counted guilty of a misdemeanor, and punishable accordingly. A person having a right of common pasture cannot legally kill the rabbits surcharging a common, but the owner would be liable for an action for so surcharging it. Persons may,

however, legally kill rabbits coming on his own private grounds, and any person may breed as many rabbits and hares as he chooses notwithstanding it may be injurious to the land of his neighbour. The difference between a private rabbit and hare warren on private ground and a free warren is, that the latter can only be formed by grant from the sovereign. So a dog self-hunting there, cannot be shot; and the lessee or tenant may, unless expressly restrained, plough up the land on which it is made, without being liable to damages for waste.

Woods and Trees may be sold separately from the soil on which they grow, and an exception in a lease therefore of woods and trees does not except the soil as well as the trees; but a conveyance of woods will pass the soil as well as the timber and underwood. Trees are considered as part of the *realty* of an estate, and descend to the heir, and though a proprietor of unentailed property may sell them *in toto*, and they pass, whether the vendor die prior to their severance from the soil or not; yet such is not the case in an entailed estate; for if the holder die prior to the severance of the trees, the party who has bought them becomes dispossessed, as they then belong to the heir. But in some cases they are looked upon as the property of the executor or administrator; as for instance, where the late proprietor has sold them to be cut down. Should a tenant in fee demise a piece of land on lease, and except the trees, and afterwards grant them, they become the property of the lessee, are vested

in him, and consequently separated from the inheritance. But in the event of the same tenant *purchasing* the estate for himself, they immediately become one property with the land again, and descend to his heir. Trees are said to belong to those in whose lands they were first sown and planted, though authorities on this point differ. Injury of trees is punishable by fine and imprisonment, and in some instances by transportation, according to the value of the property destroyed.

Yards and courts are portions of land attached to houses and generally enclosed, and if common to several houses, continue in possession of the landlord with a right of way to the tenants. Both yards and courts are excepted by the Highway Act from the liability of being taken for widening the highway. Where enclosed, any person found within courts or yards for an ulawful purpose, is punishable as a rogue and vagabond.

Trespass is an unlawful entry upon another person's lands, and doing injury thereto. The most common kind of trespass is the treading down or consumption of grass by another person's cattle; and if the cattle be driven into the field in which they commit the trespass, or if they have gained access to it through the fence being broken down by the neglect of the owner of the cattle, he is liable for the damage. Removing a tombstone, cutting down a tree, or any other act without sufficient authority, is a trespass.

Waste, implies the impoverishment of an estate by

wilful negligence or sufferance. It comprises all sorts of injuries, such as the dilapidation of a house, the felling of a tree, the stopping of a watercourse, the decay of a bridge, or any other act or omission whereby the estate stands in a worse position at the end of a tenantcy than it was at the beginning. Tenants for life, unless made expressly dispunishable for waste, commit a trespass in cutting down a tree, even though for their own private use. But tenants intail, after possibility of issue is extinct, are made dispunishable for waste. For *permissive waste*, however, this rule is not so strict with regard to them, and, unless the dilapidations of an estate evince wilful negligence, no impeachment for waste will lie; but they are liable to keep up such buildings as they have received in good condition, though they are not responsible for the extraordinary effects of God's providence, as by lightning or earthquake. Tenants from year to year are bound to avoid all voluntary waste, but not so liable for permissive waste, nor obliged to make good the wear and tear of the premises, unless expressly required to do so. Tenants who are strictly at will are not compelled to repair or make good the estates they hold. Tenants at will according to the custom of the manor, or copyholders, are guilty of waste, if they dig mines or cut timber for any other purpose than repairs, unless authorized by special custom, which can never happen with any but copyholders with an estate of inheritance. If, also, a copyholder cut timber for repairs, and afterwards exchange it for

other timber, it is accounted an act of waste on his part. But the most inveterate of all injuries, in law as well as fact, is what is termed *ouster*, or dispossession of lands, whereby the rightful owner is prevented from the occupation of his own property. It may consist either in *abatement*, in which the devisee of an estate is prevented, after the death of a testator or of the ancestor, from entering upon the property, by the prior occupation of a stranger. All parties are called *strangers*, in law, who have no legal right or title to the property with which they have presumed to intermeddle, though they may otherwise stand in the nearest relationship to the proprietor. Another species of ouster is termed *intrusion*; that is, where a stranger has entered upon an estate unjustly, after a certain determination of right, and before the remainderman or reversioner could take possession. *Disseizin* is a wrongful putting the right owner out of the property. *Discontinuance* is, where any one, having an estate tail, grants a larger estate in it than he is entitled to; as, for instance, conveying it away as a fee simple. *Deforcement* is where the entry of the present possessor has become unlawful by ejecting the legal proprietor before his right in the estate is determined.

For each of these offences against right the law has provided a remedy, the means of redress consisting of five kinds, which are called *real actions, mixed actions, personal actions, injunctions* by a court of equity, and *abatement* or removal of a nuisance.

Real actions were adopted for the purpose of obtaining restitution of lands without looking for damages for injuries sustained. They are of two kinds—*possessory*, which is founded on the possession and seizin of the demandant, and *ancestral*, which is based on the title derived from an ancestor of the demandant. This latter plea was of two kinds, viz.—*ancestral possessory*, and *ancestral droitural*; the former having reference to the possession of the party from whom the estate descended, and the latter expressive of a bare right to the estate which had come down to the demandant. Thus, in the one case, the possession of the property is the object of the suit; and in the other, the right to it only. If the right owner of an estate had been deprived of it by the intrusion of another, by the effect of a will which was, in fact, void, in consequence of an insufficient power to bequeath the property, a peaceful entry on the lands may be made by him, he thereby declaring that he took possession, and thus restoring his own seizin. Just in the same manner a remainderman, entitled to the reversion of an estate, may take possession soon as the contingency which barred his immediate inheritance has expired. Until this entry was made, the owner had no power to aliene or convey the estate, but could only transfer his right to it; nor could the land have descended to his heir. But he might release his right to the property, to the party seized or in possession of it, and thus have vested the whole right of the estate in him. By the statute of 1 & 2

William IV., c. 56, s. 26, such rights of a bankrupt, or right possessed by a bankrupt's wife, are vested in his assignees by virtue of their appointment, and immediately on its adjudication.

If, through negligence, the right of entry be not exercised, and the wrongful possessor hold the estate till his death, and pass it to his heir without interposition of a holding by the husband of a female enjoying the property in right, or apparent right, of his wife, technically called, in law, *curtesy*, or without the enjoyment of the property by a female in right, or apparent right of her deceased husband, technically called, in law, *dower*, and the inheritor have acquired the right by disseizin, and retained it without question for five years, the entry of the right owner is dispensed and taken away, and he cannot thereby acquire possession of his property against the wrong doer, making his had been placed under some disability of unless he claim at the time of the descent of the land, and from which disability he had not been delivered since he became entitled to the right. Being abroad during the period is considered a disability.

In order to save continual litigation, and to put property upon as stable and settled a basis as possible, it has been decreed by statute, that no person shall possess the right of entry, or establish any claim to an estate, unless the claim be preferred within twenty years of the period when the right first accrued, or within ten years after that, provided the party entitled laboured under any disability. A farther period of

ten years after that was reserved for the preference of the claim of his heir, after his death. In the event of the claim not being brought within this whole term of forty years, the whole title to it defeased, and the holder becomes really, as well as presumptively, the owner.

Thus, by the non-exercise of the right of entry until the death of the lawful owner, the law presumes him to be equitably entitled, and therefore throws the onus of proof against his right upon the claimant, and he must, consequently, pursue a more circuitous course for the recovery of his right. This is by two means, either by *writ of entry*, showing that the possessor came into the estate unlawfully, or by *writ of assize*, which was also a real action, in which the claimant showed the correctness of his own title, by his own or his ancestor's possession. If he pleaded his own possession, he must show that possession to have been within thirty years of the time of the suit; if in right of his ancestor, he must show a possession within fifty years. But this, after all, only proved the right of possession; the claimant had, farther, in most cases, to establish his *right of property* by a real action, called *ancestral droitural*.

This might be done in three different ways. Of these the *writ of right* was the highest kind, and might be brought after the judgment of a possessory action. It was only necessary, however, if the design was to prove the possession of an ancestor; for if the demandant proved his own possession, this proceeding

was not needed. But if otherwise, the seizin of the ancestor must be shown to have been within sixty years of the commencement of the action. This writ will also lie between parceners, or joint proprietors, at common law, and also between parceners by gavelkind.

The second was called a *quod ei deforceat*, and was brought to try the right of ownership, where the claimant had lost his power of possessory action through default of answering to summons duly served. The third was called a writ of *formedon*, and was brought where the claimant's estate had been turned into a mere right. But these real actions have been abolished by 3 and 4 William IV., c. 105, and the statement of them, therefore, is only useful as showing the necessity which the law imposes of a diligent care of property, and the anxiety and efficiency that exists in it to do justice to all parties.

There were also two other writs, called a *writ of dower* and a *writ of right of dower*, which are retained under the late statute. The objects of them are stated in their titles, giving to widows a protection against the carelessness or inability of their lawful protectors, in case they died without becoming seized of the property on which the dower is sought to be recovered. By the statute, however, which abolished real actions, the right of recovering more than six years arrear of dower is precluded; and it is by the widow alone that dower can be recovered, for the claim to such benefit ceases at her death.

A *mixed action* can now only be brought by writ of ejectment. It was formerly used to recover lands from which the claimant had been ejected; but it has of late been applied to adjust the right or title to interest in lands, of whatever nature it may be; and is indeed, now substantially the only course for obtaining them. In this action the claimant has to establish the identity of his title, together with its legality and sufficiency at the time the property demised; then the actual ouster by the party he pursues; and, lastly, the identity of the premises, with the assertion in his declaration. Against this the defendant has to show, that the title is either unjust, or that it has expired; or that all his opponent's legal estate has been conveyed away by mortgage; or, if both plaintiff and defendant claim under the same ancestor or party, the defendant may disprove the legality of the title of that party at the time he made a conveyance of the property to the defendant.

By statutes lately passed it has been decreed, that a party, if entitled, may not only recover possession, but also damages, in the nature of mesne profits, where the party holding over stands in the position of tenant to landlord, during the time the wrongful possession continued, and up to the period of the delivery of the premises recovered by ejectment.

Whilst, however, the actions of which we have been speaking had reference to the possession of property, as well as remuneration for damages sustained by exclusion from it, *personal actions* are brought only for

reparation for injury, without dealing at all with possession, and sues for remedy against any one who has unlawfully entered upon lands, as well as for damages sustained therein. Consequently, no one can institute such an action who is not, or has not been, actually seized in the lands of which the count speaks; though he may not be so, nor is it required that he should be so, at the time the action is brought. Should, therefore, this fact be denied in the pleadings, the plaintiff must prove it. But the mere possession of lands is, unless proved to be illegal, or disproved altogether, evidence sufficient to show the right to bring the action. So, also, mere occupancy is a good title for the time being. Nor is it necessary that the party bringing the action should have the exclusive possession of the soil at the time of its institution, or requisite to declare that he entered to take possession, provided his acts show that he did so; as, for instance, himself, or any one at his desire, and by his authority, ploughing the lands, or doing anything of the like kind. But where a lease expires by the death, outlawry, or voluntary waste of the lessee, the lessor can bring his action of trespass, as also for waste by felling trees, excepted in the lease.

A person may become a trespasser either by his own act or that of his dependents, though a master will not be liable for the wilful trespass of his servant, unless it appear that the trespass was the natural and necessary result of obedience to his orders. A person may

also become a trespasser by subsequent assent to a trespass, though this does not extend to femmes-coverts or infants; for they are looked upon as involuntary persons in such cases. Just as it is with master and servant, so is it with employer and agent,—the former being bound by the acts of the latter,—the law holding every man responsible for the discretion of the party he employs; whose wrong acts, therefore, will, in cases of trespass, revert to his principal.

The pleas in justification of a trespass are as numerous and varied as the acts themselves, but refer chiefly to three heads; a denial of the right of the plaintiff to bring the action; denial of the fact asserted, or a justification of its commission, by showing that either the party had a right to do it; in some cases, that it was unavoidable, through the fault of the plaintiff, and that the damages laid are excessive; or that the act itself is not injurious. The replication of the plaintiff must refute these assertions.

By a statute of Charles II. it is enacted, that no plaintiff shall be entitled to any costs of suit in trespass, unless the damages awarded are more than forty shillings, or unless the judge certify on the back of the record that his title was in question. But the act does not apply where the defendant pleads special justification; and the plaintiff, therefore, would, in such case, be entitled to full costs, and the same principle holds where the judge certifies that the injury was wilful and malicious.

CHAPTER V.

INCORPOREAL HEREDITAMENTS.

Advowson is the right of presentation to an ecclesiastical benefice, and is considered to be of two kinds, *appendant* and *in gross;* the former dependent upon a manor and passing with it when conveyed away; the latter not dependent upon lands left but upon a person, so that when upon the conveyance of a manor, it is stipulated that the advowson shall be separated from it, it is then changed from an *advowson appendant* to an *advowson in gross*. But an advowson may be retained with any part of a manor, even to one or two acres; but in so retaining it the advowson and the quantity of land to which it is made appendant, must be expressed by the same clause in the deed, for without they are thus expressed as being connected together, they become separated by the conveyance, and the advowson will either pass with the manor or fall in gross. But the advowson may be separated in other ways, as for instance, if it be granted alone without the manor, or if the patron present to it *as* an advowson in gross. Yet it may, in some instances, be made appendant when it has been separated, as when the manor is granted for life without the advowson, for on the expiration of that life, the two are joined again; or where the advowson is granted for life, and a third party is enfeoffed in the manor and appurtenances, for on the expiration of the life, the advowson naturally returns to the manor as one of

its appurtenances. There is an exception in respect of the crown, for it is part of the royal privilege that in granting a manor, notwithstanding it be not expressly specified, the advowson is retained, though in the restoration of a bishop's temporalities such is not the case.

Advowsons, not being corporeal hereditaments, must be granted by deed or will, and this for one or more terms, or as many as shall occur during a limited period, except by such persons as have only a life and trust interest in the property, as trustees for schools, deans, prebends, or other official personages.

A grant of the next avoidance may be made prior to the occurrence of that avoidance, but it cannot be made by a common person, during the actual existence of the avoidance, while the church is absolutely void; and a grant of the advowson under similar circumstances is equally void, because it is conceived that the allowance of such grants would lead to simony, one of the greatest evils to which the church could be subject; and the principle holds equally with a release of the title of one to the other, when two persons have a grant of the next avoidance. If the patron of a living die while the church is vacant, the presentation forms for that time part of his personal property, and goes to his executor, and not to the heir. So in the case of a prebend having an advowson dependent on his prebendary, his personal representative, and not his successor, will present. But such is not the case where the incumbent is

himself the real property possessor of the advowson, or to speak more precisely, is seized of it in fee, for then the heir and not the executor has the right to present. But if the incumbent have the right to will he can devise it to whomsoever he pleases, that is provided the devisee is not incapable of legally inheriting it.

Advowsons have been divided into *collative*, *donative*, and *presentative*.

A *collative advowson* is where the advowson is vested in a bishop. Collation differs from institution, in that the former is the presentation of a bishop in his own right, and is the giving the church to the parson or rector, and differs from a common presentation in that the latter is the giving of the parson to the church; institution is done by the bishop on the presentation by another. A bishop possesses the power of calling to a benefice in the event of a patron neglecting to do so, but such a circumstance does not put the patron out of his right, for the bishop in such case is only trustee for the spiritual welfare of the people, and his collation here is merely to supply a deficiency. When the patron therefore presents his clerk, the bishop is required to induct him.

A *donative* advowson is where the patron puts the clerk in possession of the living by a donation in writing without any other form. Donatives, whether of parochial churches, chapels, or other livings, may be out of the jurisdiction of the ordinary, who consequently cannot demand procuration; and if, therefore

the authority of this official be allowed by the donor presenting his clerk to him, the advowson immediately becomes *presentative*, and can never resume its ancient privilege of extra jurisdiction. But this right of donative does not merge if a stranger usurp and present in this way. The right of a donative partakes thus of realty, that the power of donation descends to the heir, if the ancestor die seized, and the church become void in his lifetime, and not to the executor, as is the case with a presentative.

The nature of a *presentative* may be gathered from the few previous observations; the tenure of it implies that the patron is required to present his clerk to the ordinary before he can be rightly inducted into the living.

A *lapse* is a title given to some other individual to present to a living in consequence of the neglect of the right patron to present to it within six months of its becoming vacant. The right passes from the patron to the bishop, then to the archbishop, and then to the king, as head of the church. The time required to be past before a lapse commences is six calendar months. Yet, should six months be passed, if the bishop has not collated, the presentation of the patron will be good. After twelve months, the right of collation passes to the archbishop. Should a living remain vacant several years, and the patron be suffered to present, and the presenter resign or die before the king hath presented, the patron recovers his right; and if, in the event of a church remaining void in consequence

of the bishop being a disturber, and by his fault, no lapse shall be suffered. Should the bishop refuse to induct a clerk in consequence of deficient learning, or of bad conduct, he is bound to give notice of it to the patron, in order that the latter may have his right of preventing the lapse. He is bound also to give notice to the patron on the vacancy of a living by the resignation or deprivation of the incumbent, and a lapse would not ensue until the end of six months after such notice; but, in the event of the death of the incumbent, notice is not required by law; for, where a superior authority does not interfere, the patron is expected to be the conservator of his own property. Where notice is given, it must be given *personally* to the patron, if he live in the same country; and if the vacancy be occasioned by deprivation the notice must assign the cause. If the patron live in a foreign country, the notice is given by being posted on the church door. The circumstance of the incumbent being deprived by the prosecution of the patron himself, in no degree alters the rule of notice; for, though he cannot in such case but be aware of the vacancy, he is not expected to be cognizant of the time it takes place.

If a clerk be inducted into a benefice with cure of a greater annual value than £8, having already a benefice with cure, the first becomes void if he have obtained no dispensation to hold both. During avoidance the house and glebe of the benefice are in *abeyance*, and the profits of them, during that period, go to the next incumbent, for provision against thefirst-fruits; though

the bishop may lawfully provide out of the proceeds for the service and business of the church.

When there is no notice on the part of the ordinary there is no lapse; but where there is, lapse ensues in every instance, whatever the patron may be, even a femme-covert or an infant. With the king, however, there can be no lapse, because he is not bound by time. Lapse is prevented by presentation, and institution though no induction may have taken place.

When by usurpation, which is the quiet possession of a benefice for six months on the presentation of a party who had no right to present, a living has been unlawfully filled, the right patron may bring his writ at any time to remove the usurper, though unless the action be brought before the six months, he cannot remove the clerk who has been admitted on the wrongful preservation.

By the common law the right of advowson is really fixed in the patron of a living, and it may be occupied like any other real property. A wife may be endowed with it. A husband may be tenant of it by the curtesy. It may be granted by deed or will, and becomes forfeited by treason or felony. If an advowson descend to coparceners, they are each seized in their separate estates, but the eldest sister shall present first. An alien cannot present to a church in his own right; for, if the living becomes void during his possession of the right, the presentation falls to the king, and no alien has any right to purchase or occupy a benefice with-

out licence from the king on pain of præmunire. Papists can exercise no active interest in advowsons; the universities having the right of presentation where papists are seized in fee of advowsons. Grant or devise of advowsons by papists, except to protestants for a valuable consideration, and for the use of protestants are void, and happily the Catholic Relief Act, in its ruinous influence on the constitution of the country, has wisely left this regulation unaltered.

Where a patron is under age he shall present, and not his guardian; and if two clerks are presented, without revocation before admission by the bishop, the bishop can institute which he pleases. If there are two patrons to a benefice, on having a right of nomination, and the other of presentation, the party appointed by the nominor shall be inducted, the other being obliged to present on his nomination.

A dean and chapter cannot present the dean, nor can a clergyman who is the patron of a benefice present himself, though he may pray the ordinary to be admitted, and, if admission be granted, such admission becomes lawful. But a prebend having a living attached to his prebendary, may present himself; and if there are joint tenants in an advowson, one may present the other; or, if there are three, two of them may present a third.

If a rector is made a bishop the king shall present to the rectory, unless previous to his consecration he grant a dispensation for the incumbent to hold the rectory with his bishopric, and, in this case, the grantee

of the next presentation hath lost it as the king retains the right of the next presentation. The king ought also to present to his own advowsons on the right authority, so it is held that if the king present to a benefice on the plea of a lapse when he ought to present as a matter of his own property right, that is a right which has not accrued to him of prerogative, the presentation is bad. It is a repeal of a first presentation if the sovereign make a second before the first is completed by induction, and the ordinary must induct the second, which is not the case on the presentation of a common person, for there the ordinary can induct which he pleases.

The presentation of a patron *in excommunicatione* may be rejected by a bishop. When a bishop has a presentation in right of his bishopric, and dies with it on hand, the right of presentation for that time goes to the sovereign. A presentation to a church when full is void, and cannot avail. If a coparcener in an advowson present, and his presentee be inducted and afterwards deprived, that coparcener loses his right for he has for that time fulfilled it; but, if his presentee be deprived before he is inducted, the coparcener can present again. A presentation may be by parol, or word spoken, as well as by writing, but it must in either case be made to the presentee himself, and not to any other party on his behalf. The Lord Chancellor is presentor of all livings in gift of the king.

Right of presentation is lost in most of the ways by which other real property becomes forfeited.

Annuities are a species of rent granted by one

seized in a certain estate for some consideration connected with which he agrees to allow another an annual sum, charged upon his personal liability, and granted for a term of years, for life, or to an individual and his heirs. In making such a grant, no particular form of words is necessary; but it arises in a variety of ways. An annuity may be granted as a rent-charge upon land, in which case the sum to be received becomes a rent-charge, or an annuity, as the grantee may elect; so that he may, in the event of non-payment, either distrain for it upon the land, and thus treat it as real property, or bring a writ of assize, and make it personal. Should he take a distress for it, he may afterwards bring the writ by discharging the land. If two persons grant an annuity to a third, if in the deed they are not specified as separate individuals, and so made severally responsible, he can recover only against them both as one person, and not against each; so that his security is thereby reduced full one-third in its value. A new writ will not lie for the arrearages of an annuity that is determined after the last principal has been recovered, but both portions of the debt must be made to lie in one precept. If a person have an annuity for life, he cannot bring a writ of annuity, because the property is real; but, after his death, his executors may, because the realty then becomes resolved into a personalty.

Should a person, whose annuity is payable half-yearly, die prior to the day of his payment, the ensuing payment is liberated, the party responsible for it

being exonerated. So, if it be payable at a certain season, as during the feast of Easter, the payment is relieved if the annuitant die before the termination of the feast, or at least before the last day, for it is on that that it becomes due. An annuity ought to be granted with an express covenant for payment, so that the grantee may be relieved from any difficulty in recovering the sum by bringing an action for breach of covenant, and thus recover both principal and costs. In every deed for granting an annuity, the name of the party who is to take it beneficially should be carefully stated.

If any person advancing the consideration have a portion of the same returned to him, or if he fail to make good his engagement, either by not advancing the whole sum specified; or, if he evade its beneficial influence to the grantor, as by giving the whole of the purchase in goods, or part in goods and part in money, when the agreement specifies that it is to be all in money, the engagement is void. No agreement for an annuity is valid that is entered into with a minor, notwithstanding any attempt to make it so on the infant coming of age; and any person soliciting or endeavouring to induce an infant to grant an annuity, is counted guilty of a misdemeanour; as also are solicitors, or brokers, demanding more than ten shillings per cent for procuration money. Moreover, memorials of all deeds for granting annuities for a life, or for lives, or for a term of years, or for a less estate determinable on lives, must be registered in the

Court of Chancery within thirty days after its execution. Such memorial to contain an abstract of all the facts contained in it; such as date, parties interested, parties attesting, and all other circumstances necessary to show, or identify, the deed, in a certain form, as specified in the act requiring it, 53 Geo. III., c. 141, (which act, however, does not extend to either Scotland or Ireland); and every deed which has not a memorial of it so enrolled, is declared to be utterly void and valueless; though if, in other respects, the dealing in the matter be fair and honourable, the consideration money may be recovered by him who paid it.

Common right, or *right of common*, is the right which one person has to feed his beast, to catch fish, dig turf, cut firewood, or other wood, or do any other act for his benefit and comfort, on the lands of another without payment for the same; and it is usually an advantage enjoyed by the tenant and allowed out of the ancient seignory of the lord, being either exclusive or not exclusive of him. Right of common is chiefly of four kinds, termed common of pasture, of fishery, of turbary, and estovers.

A common strictly defined is a piece of waste ground in a state of nature, exclusively occupied by no one, but the right of soil in which is generally in the lord of the manor; just as in common fields, where the land has been reclaimed, and enclosed, it is in the tenants, and said to be either *appendant*, *appurtenant*, or *in gross*.

Common of pasture appendant is the right enjoyed by the tenant, by the common law, of depasturing his beasts of tillage, or manurance upon certain lands within the manor, but especially upon the lord's waste; a privilege which was originally permitted partly from necessity, when from the want of enclosures the distinct right of tenantry could not be strictly defined, or for the encouragement of agriculture, by the clearance and fertilization of the land. It is a right, therefore, that cannot commence in England in the present day, but which is illustrated in its peculiarity and perfection in all the partially advanced colonial settlements of Great Britain. Such a right of common as this cannot begin here at the present time, because from the abundance of the inhabitants and the full occupation of the soil, increase of accommodation without increase of rent seems to be entirely precluded; and in reference to common right of ancient standing, the number of cattle which a tenant can turn upon, the common land is, in most cases decided or otherwise restricted.

Common by reason of vicinage, seems to be the only modification of common appendant, and has arisen by the neighbourhood of two manors or townships, the settlers on which have enjoyed the advantage of turning their cattle respectively, without restraint, on each others' waste lands, in consequence of the non-existence of a fence, by the erection of which it is said the lord of either manor can at any time terminate the right of community of pasture between them.

Common of pasture appurtenant is a right of pasture on other lands, than those connected with the lordship, and depends either upon immemorial custom or express grant, in which case it may have begun within legal memory or since the period when the statute law began to take effect, that is since the commencement of the reign of Richard I. The number of cattle kept by the several tenants during the last twenty years is the number to which the respective tenants are restricted, and the presumed rule by which this is regulated is the number of the cattle which the common is able to support during the season in which the cattle are excluded from the common.

Common of pasture in gross is such as is granted to a man and his heirs, and consequently does not depend upon the land, but becomes a personal right inherent in the person and posterity of the party who obtains it; or it may be claimed by prescription, in which there is a supposition of an original grant by deed, as by an incumbent of a church or other *corporation sole.* Hence, not being dependent on the land, it may comprise any amount of right, and is not regulated in any way, at least so far as its legality goes, by the number of cattle which the land is able to support, and may be transferred without any restriction.

Common right being unincorporeal hereditament, but depending on something corporeal, is naturally passed in a conveyance of the lands to which it appertains, without being expressly specified in the deed. Common appendant or appurtenant, cannot of coursé in

general pass to a tenant's heirs, but common in gross is entailable.

Right of common becomes merged in any superior right, as when a tenant purchases any part of a manor over which he engages such right, though this in no way militates against his right over the other parts of the waste, but unity of seizure only suspends a prescriptive right. The right of common may also be suspended by lawful enclosure, and 6 and 7 Wm. IV., c. 115, makes several provisions for that purpose.

As it is presumed that grants, of the nature of rights in common, were originally made for the purpose of utility, and not merely for the creation of property; a right of common in pasture cannot appertain to a house merely, and therefore any one claiming such a right must prove the possession of some land, or at least of a curtilage before he can establish it.

But by the act 2 and 3 Wm. IV., c. 71, the rule of limitation was made to hold in this case as well as in all others; and though prior to the passing of that act prescription was of uncertain tenure, and if obtained within legal memory, was considered as but an insufficient ground of right; by that statute it is enacted, that twenty years using or the contrary will establish or nullify a right of common.

An act of enclosure of common lands can only be obtained through consent of two thirds of the tenants in common, and any fence erected on waste or common lands without the assent of a commoner, or without legal assent, may be prostrated by a tenant; but it

is at all times advisable, prior to such abatement, to request the lord to remove such fence. But a tenant in common of lands cannot lawfully fell trees, nor let off water from a pond lately made by the lord of the manor, though he may drive off the cattle of a stranger.

One commoner can maintain an action for disturbance of the common by another tenant in common, though he may himself have been guilty of a surcharge; but if an action for such species of trespass be brought against the lord, the plaintiff must prove that there is not sufficient of common left for the use of the community; and also where a stranger has received licence from the lord to turn cattle on the common, the latter may be barred of his privilege on the same account.

Common right of *fishery* is subject to most of the same regulations as common right of pasture.

Common of *turbary* consists in a right to dig turf and carry it away from the ground of another, and resembles other common rights; but with this difference between this and a right of pasture, that as this latter cannot be made appurtenant to a house only, so the right of turbary cannot be made appurtenant to land only. For turf is used for the purposes of fuel, and therefore is only useful in a house.

Common of *estovers* is the right of cutting wood necessary for the furniture or use of a house or land. A tenant for years can, besides having wood necessary for the more insignificant purposes of a house, or for

his farming implements, fell trees also, for the repairs of a house, provided he is not expressly restrained in his lease; but if he is so, the lessor can sue him for felling such trees, and can himself enter on the land demised to fell and carry them away, whereas if they be not so expressly reserved, he cannot thus enter and carry them away. The same rule holds with respect to this common right as to the other: and therefore a common of estover cannot be made an appurtenant in gross, but must be attached to some house or farm. All common rights must be reserved strictly within their original limits; and should therefore any alterations cause an excess in the privilege of estovers, the tenant may be proportionably restrained.

There is also a right of sporting over the lands of another, as also for digging of coals, reserved by the common law.

The rights of common property so enjoyed are not liable to poor rates; such rights, however, of this kind as are attached to land, are liable to these impositions under that head, not in express taxation, but because the land to which such common rights are attached is, in fact, rated much higher than it otherwise would be.

But there are also, not only rights in common, but also exclusive common rights, which become a superior species of real property to that already enumerated, and must be vindicated by action in ejectment, while the former must be vindicated by action on the case, and are not, like the former, subject to poor rates.

Nor do they pass invariably with the land. Indeed, it often happens that they are separated altogether.

Each common right is justified and supported by the circumstances to which it is subject, and must be vindicated according to them. The right of property is recognized as existing in the privilege and not in the substance, or soil of the place on which such custom has prevailed. There is also a common right of road or wagon way to certain districts and places, especially where there is an exclusive occupation of the soil. The right to which may be supported by action of ejectment.

In a common right of waters it is provided that none shall use them to the general inconvenience of the commoners, and, therefore, without consent of the other proprietors, no one has a right to appropriate the waters to his own use.

Corodies are rights to certain allotments of provision or other sustenance, which are frequently exchanged for a specific sum of money, and partake largely of the character of annuities.

Dignities are rights to certain titles or employments as appendant or appurtenant to such lands, and sometimes the possession of the land is dependent upon the dignity. Thus the office of champion at the coronation of the sovereign carries with it the manor and lands of attached to it.

Easements are a species of advantages enjoyed in the lands of another, without any positive profit, but partake of the character of necessary conveniences.

A private right of way in which one man has a right to cross the lands of another is the chief and most general of these conveniences, and may be generally annexed to houses or lands, which it consequently follows through all the varieties of ownership, or a right in gross may be enjoyed by and descendible from a particular person not being properly a tenement. The term Easements includes also rights for watercourses, antient lights, and, indeed, every species of convenience.

By the 2 and 3 Wm. IV., c. 71. forty years enjoyment of any way or other easements, of any watercourse or twenty years enjoyment of or access to any lights to or for any dwelling houses now confer a prescriptible and indefeasible right in any occupier unless there be some written agreement or express acknowledgement that the right is held on sufferance. Non-user for the same time occasions conversely the loss of any such right. Remedy for injury is by an action on the case.

In the event, however, of any lands or other tenements being leased to an under-lessee, where the right of way had been enjoyed for twenty years, and it can be shown that this right was exercised by the temporary tenant without the cognizance of the chief lessor, the claim of right will be defeased, as was decided in the case of Bright *v.* Walker, by Mr. Baron Parke. As between lessees, however, the right will doubtless hold.

There will also be a presumption of a dedicatio

of away to the public when the owner has thrown it open to and it has been used without let or hinderance for six or even for four years. A tenant, it is true, cannot give such right of way to the public without the consent of his landlord; but, if after frequent change of tenants, a continual and notorious use of the way for a considerable number of years, the law will conclude that the right has been yielded by the owner.

In the event of an injury or obstruction to the right of way, the injury may be abated by prostration or removal of the same, or an action may be brought on the case as for a public injury. The tenant may, however, show a defence by proving that the right of way was stopped by two justices, or that a unity of seizin has given him the right of obstructing it.

Another kind of convenience, which is designated as an easement, is the pew in the parish church, the right of use to which is usually attached to a dwelling-house, or messuage, and which is considered an incorporeal hereditament attached to real property. The right is derived either from prescription or usage. The former obtained through a grant, or faculty, as it is called, from the bishop, or other ordinary; and the latter, which always supposes a faculty from undisturbed enjoyment for thirty-six years,—sometimes, for above twenty years. The right to a pew may also be appointed to different messuages. If no such right can be shown, the privilege arises severally from ecclesiastical cognizance; and a suit, therefore, in the Eccle-

siastical Court, will be sufficiently sustained by showing the possessory right; yet the sentence in the Ecclesiastical Court, or even Court of Arches, is not *conclusive* evidence of the right. But the best remedy for disturbance in a pew is by action on the case; in which, if it be brought against a stranger, the plaintiff need not prove having made repairs; but, if against a stranger, he must do so, or fail. In both cases, he must show that the pew has been attached to some messuage in the parish; and of this an entry in an old vestry book, signed by the churchwarden, will be evidence. An action against any one who breaks or injures the pew, will also be sustainable as for trespass.

Manorial rights, are rights dependent on a manor or demesne, and attached thereto. Though occasionally profitable, they generally consist in some immunities or benefits of an honourable and pleasurable kind. Of the nature of seignories and their demesne lands we have spoken before, and must refer the reader to that account. In consequence of the partition of lands, if a manor be so divided, it appears that all the coparceners in the title to a manor will be infeoffed of a portion and general enjoyment of those rights. A manor will become extinct if all the freeholds be separated from it, so that two tenants are not left to do suit and service. A copyholder, who strictly speaking is but tenant at will of the land he holds, may release his tenements to his lord in fee, and thus create an enfranchisement of his holdings; and

tenures thus changed will become extinct. If a copyholder were to take any interest formed out of a freehold tenure, however small, it will extinguish his copyhold right, but if the lord should convey a freehold tenement it will carry all the customary estates in it; and should a tenement have escheated to the lord, he can, if he so please, grant it out after the custom of the manor, a power which may remain dormant in it for any length of time, but any conveyance or lease of it made by the lord, would destroy its customary quality, if it were not according to the custom of the manor, or would suspend any less estate which he might possess in it. A copyhold tenure must be immemorial, and consequently cannot be created at the present day, unless in some manor possessing a peculiar right to form one.

A manor may, strictly speaking, be destroyed by the failure of tenants of service, but its reputed character does not thereby cease, and it will consequently pass in conveyances under that name. Nor will its prescriptive rights be thereby generally lost. These rights are of various kinds, such as the right to treasure trove, waifs, and estrays, wrecks, a park, free warren, a fishery, or to take royal fish, the right to have a court leet, and the view of frank pledge, but all of them must be recognized as matter of record, and cannot, consequently, be extended; but the franchises of treasure trove, waifs, estrays, and the like, may be claimed, by prescription, as arising from private contingencies. Besides also there is the right to keep a

fair or market, and the right to take tolls may be established in the hands of a subject from having been annexed to a manor by prescription, but such a prescription will only have reference to things exposed for sale in the open market, and can in no way interfere with goods in shops which happen to be within the limits of the franchise.

Besides these prescriptive and customary rights the lord of a manor is also entitled to a fine upon every admittance of a new tenant. These admittances are stated by Judge Blackstone to be of three kinds,—first, an admittance upon natural grant from the lord; secondly, an admittance upon the surrender of a former tenant, and an admittance upon descent from the ancestor. In all these circumstances the lord is only considered as an instrument, and though he may, if he will, grant the lands as a freehold or socage tenure, yet if they are granted as a copyhold, he is bound to observe all the customary usages of the manor. Formerly admittance was necessary to the complete alienation of copyhold lands by will, but by 1 Victoria, c. 26, the devisee of customary freeholds is enabled to dispose of them without the usual surrender, but yet with payment of all the dues and fees which would have been paid had the copyhold been surrendered and the usual admittance been passed through. In admittances also by descent, no farther rights are conceded to the tenant by the act of his lord, and whatever be the defects of the lord's title, it in no way affects the interest of the tenant; so that provided his dues are

paid, and he has performed all the articles of his covenant, he is really entitled to the proceeds of his estate. There is however this difference between the admittance by descent and surrender, that in the event of the death of the surrenderor, or before the admittance of the surrendree, the estate descends to the heir, and unless peaceably delivered, the surrendree must obtain possession of his estate by act of ejectment, for he has no action in trespass. Where, however, the heir takes a customary tenement by descent, he is tenant in copy immediately, upon the death of his ancestor, and though he cannot fulfil all the engagements to which he is liable, the law to most intents takes notice of him as a perfect tenant, and he may perform all the acts to which he is entitled in right of his heirship; therefore it appears that the admittance is rather for the benefit of the lord than of the tenant, and simply that he may receive his fine. Sir Edward Coke has therefore expressed an opinion, that if it were not compulsory few tenants would avail themselves of admission, but heirs are compelled to come into the lord's court under some heavy penalty, such as forfeiture of their copyhold, and obtain admittance, a short time after notice of the deaths of their ancestors. In apposition with this it is now the established rule that a writ of mandamus from the Court of the Queen's Bench may compel a lord to admit any one who has a right to be his tenant. Whether a lord can compel a mortgagee of copyhold, however, to become admitted after condi-

tions broken by the mortgagor will depend upon the custom of the manor.

The lord may maintain an action for the fine after admittance, if not paid within a reasonable time, though he cannot do so before. The amount of the fine will depend upon the rolls of the manor. When the fine is uncertain, two years improved value is admitted to be a reasonable fine, and in case of descent the courts of law generally will not allow more; but in cases of the admittance of purchasers the lord is not deemed to be restricted to this amount. Neither does it appear that in the instance of joint-tenants he would be so restricted, for on the decease of one the other may take his interest in the estate without any farther fine. Coparceners pay like joint-tenants one fine among them, but tenants in common pay according to their respective shares. When copyhold lands are settled as particular estate and remainder, the first tenant need only be admitted, but the fine will be due on any subsequent change of tenancy, and therefore it is common for all to be admitted. But he cannot, except by special custom to that effect, charge a full fine on the admittance of the remainderman. When a reversion or remainder descends to the heir, it is usual to charge on his admittance only half the fine commonly taken from a tenant in possession.

The assignees of bankrupts may surrender copyholds just as fully and completely, on behalf of the debtor, as if they themselves stood seized of the property in their own behalf.

There is also another impost to which copyhold lands are subject, called *a heriot*, payable on the death of a tenant out of his personal estate. This species of impost is divided into two kinds, *heriot-custom* and *heriot-service*. The former is a species of rent arising from a special reservation in a grant of lands: the latter is a custom of immemorial usage. It is sometimes the best live beast, sometimes a piece of plate, or a jewel; but it is only a personal chattel, to which a lord becomes entitled immediately on the death of a tenant. But as he from whom the heriot is due must be the owner of it, on the death of a femme-covert no heriot can be taken, for she has no peculiar ownership in her chattels, as the property becomes vested in her husband from her coverture. In some cases there is a composition for money; but it is a novelty, and a composition of this sort will not bind any subsequent lord. When a copyhold tenure becomes split into several estates, the lord is entitled to heriots from every one of the tenants; but if there is but an individual holding, he can only take one heriot. The statute of limitations has put a term, in this case as in others, on the power to claim rents, under which term the word heriot is included, to twenty years after the accruing of the right.

If lands on either side of a road be inclosed subsequently to its formation, the proprietorship of them will not defease the lord's title to the road which he is seized in as lord of the manor, although the owners of the land on either side will be entitled to the slips

on each side of the road. The trees growing on or by the public road are presumed to be the property of the owner of the freehold on either side, whether he be the lord of the manor or otherwise, except the land on which they grow is not contiguous, in which case they are the property of the lord of the waste, unless a better title to the ownership of the land in question be proved, in which case they would belong to him for whom the proof was adduced. When a tenant intrudes upon the waste, it is presumed to be for the lord's benefit; and if a tenant do so intrude for twenty years, without permission of his landlord or the lord of the manor, it shall be for their benefit. If the sea leave a portion of the shore dry, the land left becomes the property of the owner of the contiguous land.

The chief service belonging to a manor is attendance at the court baron, which is a regular annual service, and the court may be held every three weeks, having a jurisdiction in personal actions where the debt does not amount to forty shillings, and no fine is to be imposed upon the defendant. The lord's steward presides as register, and the suitors and tenants in fee simple are judges both of the law and fact.

Besides this court, there is also the customary or lord's court, at which alienations of customary lands must be made, and where the copyholders are suitors only, and not judges as in the court baron, but assistants to the lord or his steward, who is the judge. The two courts are usually held at the same time, and the same roll records the proceedings of both. These

rolls are admitted as evidence in the queen's courts, not only as regards the particular manor and its lands, but also as regards other lands, and as to customs as well. Where any one can show a good *primâ facie* evidence of title, the Court of Queen's Bench will issue a mandamus to compel the lord of the manor to allow him to inspect the court rolls and take copies of such facts as are necessary for him.

For deprivation of or injury to manorial rights, the remedy is an action on the case. Gamekeepers have a right to seize any persons with their guns and dogs, who are entering an enclosed park or forest with the intent of taking or killing or wounding game, and any resistance to them by beating or wounding, is made felony; and the unlawfully hunting or carrying away deer within such precinct where they are kept, is punishable as simple larceny, and constitutes felony in the eye of the law, while a similar offence in an unenclosed part of a park or forest, is punishable before a justice by a penalty of 50*l.*, and a second offence of the same kind is felony. There is also a penalty of 20*l.* against any one found with venison in his possession, for which he is unable to account lawfully, and also against any one setting a snare or breaking a fence for the purpose of taking or hunting deer.

The causes of forfeiture of a copyhold tenure to the lord of the manor are various, according to the customs of respective manors, as wilful and permissive waste, unlawfully felling trees, making an alteration of boundaries, or indeed any other act which he is bound not

to do. So also forfeiture is incurred by alienation by deed, and in a variety of other ways, for which we must refer to more ample works on the subject.

Offices.—The privileges, rights, titles to the benefits of offices are so closely allied, and so similar to those of dignities, that we need only refer to that head, and say, that, as with dignities, a man may have an estate in them and by them for any term of years, provided they are in no way connected with the administration of justice. No office of trust can be fulfilled by deputy nor can any judicial office be granted in reversion. The grant of an estate dependent upon an office implies the performance of a duty, the neglect or non-performance of which, except by licence, of course creates a forfeiture of the estate. The remedies for these estates are similar as for all others. During possession, the party seized is as truly owner as if he had inherited an estate in fee.

Rents are so termed from the Latin word *reditus*, a return, and is the incorporeal hereditament, which bears the nearest relation or affinity to land; and, it is necessary that there should be something of a corporeal nature out, which they should issue, in order that the party entitled may have an assurance of his income from this source. It consequently occurs, that where rents issue partly out of corporeal and partly out of incorporeal hereditaments, they are always presumed to be derived from the former, in order that the remedy for the whole rent may be preserved. But by the royal prerogative, the king can distrain for ren

upon all the lands of his lessee; and, therefore, it is that he can reserve it in a grant of incorporeal hereditaments. Rent cannot be paid by part of the land itself, because, that for which it is paid, being leased by some superior to an inferior, the former would, in most cases, only be taking his own again instead of a rent for the use of it. But it may be retained in remainder or reversion; because, there, though not before, the grantee can distrain immediately upon the falling in of the property; and thus, he has his remedy, and take the arrears as well as the present dues. The common law recognises three kinds of rent—rent-service, rent-charge, and rent-seck.

Rent-service implies service, and is due to the chief lord of the fee, whatever capacity he may hold, or else to a reversioner; and it is of common right, accompanied by a power of distress in case of non-payment, without being specially reserved. In such case it forms a perfect or imperfect tenure. *Rent-charge* is a payment derived by a person out of land, all interest and reversion in which he has conveyed away, but yet reserved to himself a payment out of the property, with a right of distress in the event of non-payment. *Rent-seck* differs from this, in that there is no power of distress reserved to it. There are also *rents of assize*, which are certain established rents paid by the freeholders and ancient copyholders of a manor, which may neither be departed from nor varied; those paid by the freeholders being called *chief-rents*, and both sorts occasionally *quit-rents*, because they are a

satisfaction and quittance of the lord's claim. *Rack rents* are rents to the full value of the tenement, which, in property, under a power to lease at this rate, cannot be reduced by any improvements of the tenant.

Fee-farm rents issue out of an estate in fee, which were, at least, one fourth of the value of the lands, when they were reserved, and is, in most respects, nothing less than a rent-sick or a rent-charge. By 42 Geo. III., c. 116, s. 154, if land were not redeemed from the land-tax by the owner, it was competent for any other person to purchase it, in whose hands it became a fee-farm rent.

A rent-charge issuing out of every part af the land, if the grantee of rent purchase any part of the land from which it issues or if any part of it be released, the whole rent merges, and is extinguished. By a release or grant of any part of it to an individual not interested in the land, the rent is sunk just to the value of the portion granted.

A grant of seignory or reversion will pass a rent service; or it may become a rent-seck, by being granted from either of these, and still be recoverable by action of debt, provided the rent-service carried that right. A rent and rent-seck may be granted by the owner of the lands out of which they issue, and by any form of words which declare the intention. Thus a rent-charge may be created on lands belonging to A, by a grant on his part to B, with a proviso that if B be not paid a certain sum every Easter, or other specified period, he may distrain for that amount on such lands.

And a rent-seck will arise from a conveyance of lands, with the provision of being "subject to," "charged with," a certain sum annually, without any clause for distress. Rents may, moreover, be created *in futuro*, by the canon law as well as by the statute of uses, and may be provided so as to cease and revive again upon contingencies; but, when they are created, they can be transferred only by an immediately operative grant; and when created even by verbal gift, cannot be released, either in law or equity, without a deed. If granted in fee, they are not liable to escheat on failure of the grantee's heirs, and no devise made, but sink into the land from whence they issued. But as a devise, though only taking effect at the moment of the testator's death, will prevent an escheat, so, by analogy, it will keep the rent from sinking into the land, provided it be an express desire, and not a mere authority to sell."

Before the statute 4 Anne, c. 16, the attornment or consent of the tenant was necessary to make a grant of rent valid; but since the passing of that act, conveyances of rent have been good without it, though the tenant may pay his rent as before, until he receive notice of the grant. So, also, in a mortgage, the mortgagee may be defeased of his interest by the tenant paying the rent as formerly, unless he hath given notice of his right, and claimed it. If, after such notice, the tenant pay the rent to any one other than than the mortgagee, or some one whom he may appoint to receive it; which is, indeed, legally speak-

ing himself, he is liable to pay it over again; for the mortgagor cannot dispute the title of the mortgagee.

There is a difference in the reservation of rent-service and rent-charge, and rent-seck, insomuch that, whereas the first cannot be reserved on the total alienation of the land, under the principle of forbidding infeudation for rent-service; but it must pass with the fee to which it is attached. But there may be a reservation of rents-charge and rents-seck on such total alienation, because the reservation of them to a stranger would be considered as a grant of them to him; though, in consequence of the rent reserved being severed from the reversion, he could not distrain or bring an action of debt, although such an action might be brought by the previous grantee; but an action of covenant may be brought on the words of a reservation, if the covenanter be a party to the deed. As a security for the payment of the rent, it is usual to confess judgment for a large sum, by a warrant of attorney or a bond; nor will any of these remedies pass with the rent, though the assignor may be compelled, by a court of equity, to lend his name with the object of enforcing them.

If a rent be reserved upon a lease in execution of a power, it may be distrained upon by every one in turn who is entitled to it; and when settlements contain a power of leasing, a reservation is usually made of the highest rent that can be obtained for the tenant, and consequently no fine should be taken on the renewal of such a lease, because that would naturally

tend to reduce the yearly rent. If, however, notwithstanding this rule a fine shall be taken, the lease would be void. The same principle holds where no fine is taken, but the tenant agrees to lay out a certain sum in improvements, for if it can be shown that another tenant would have taken the property at a higher rent, provided he did not spend such sum in improvements, and there the lease will be also void. But where no fine or other consideration is taken the lease will hold good, provided there be nothing decidedly wrong in it, although it be not positively shown that the rent secured is the best that could be obtained.

Where it is stated that a rent is to be paid quarterly or half-yearly, but the amount is merely set out generally, it will not become due until the end of the year. When the names of the months are stated in which the rent is to be paid, the first payment will come due in that period or time which is nearest to the execution of the lease. If rent be made payable on two alternate days, the lessor cannot refuse to receive it on either day, but it becomes due on the day on which the lease is to terminate. Sun-set on the day it is due, is the usual time of demanding rent, though it does not absolutely become a lapsed fulfilment unless it be not paid until after midnight, at which time it may be tendered by the tenant if he desire to save a default. If the lessor die on the day the rent is due before sun-set, the amount if unpaid goes to the heir, but to the executor if he die after

sun-set. Also, if a reversioner be entitled to rent, the executor and not the reversioner will take that which is due and unpaid, if the lessor die after sun-set. Otherwise rents due in the life time of a lessor go to his executor, except such rents as are reserved to a husband and wife jointly, in which case she takes them as well as the coming rent. But if the rents were reserved to the husbnd alone, both would go to his administrator or executor. But if the husband be seized of rent-service, rent-charge, and rent-seck in right of his wife, the arrears arising during her coverture will go to the wife. The reservation of rents by a woman prior to marriage does not secure them to her afterwards; they go to the husband.

When through any circumstances a lessee is legally deprived of a portion of the lands devised to him, the rent must be apportioned; and the same principle holds if the lessee never come into all the advantages for which he contracted; a deficit of benefit will authorize a deficit of payment.

Rents being of the character of realty may be entailed, and a tenancy both by the curtesy and of dower will ensue on such entail, just as it would do on a corporeal hereditament; and rents which are dependent upon the life of another may by a late statute be disposed of by will. *By a devise of rents, land itself will be passed unless a contrary intention is specified.*

For the more easy recovery of rent it has been put in the same position as a debt by obligation under seal. By the 4th Geo. 3., c. 28. sec. 5. the recovery

of rent was made uniform by remedy of distress, which had an influence to the same amount also over all rents-service and rents-seck, which had been regularly paid during three out of the preceding twenty years. With regard to arrears of rent the statute of limitations holds as in regard to all other debts, no amount being recoverable after being due six years without an acknowledgment of the same in writing.

By 11th Geo. 2., c. 19., all goods belonging to the tenant removed off the premises fraudulently may be seized within thirty days, if not sold to one not a party to the fraud. The reply, if established, that the tenant had been deprived of possession by the landlord, or had been lawfully evicted by another, or that before it became due the lessor's title had expired, will be sufficient to refute the claim.

All chattels personal are liable to distrainment, which can be proved to be the property of the debtor, except things expressly excepted by the statute, such as dogs, cats, and wild animals, or things in a man's personal occupation. Nor can sheep or beasts of the plough, or the tools of a man's trade, if there be enough of other things to satisfy the claim. Fixtures attached to a freehold are exempt. Five days must intervene between the distraint and sale.

Seignories. This is one of the chief features of the feudal system retained till the present day, and is a species of incorporeal hereditament on which much often depends. By the 12 Charles II., c. 24., the oppressive portion of knight-service on which seig-

norship is based, was done away with. It did not, however, destroy any of those rights of the lord of the manor by which pecuniary benefit, or, indeed, any advantage of a peaceable kind was derived, such as rent or heriot, or any other service belonging to the tenure in common socage. The principal of the characteristics of socage tenure by which, after this statute, all lands were held, except customary lands, are guardianship and escheat.

The first of these, *guardianship*, is the care of a young inheritor of property which the law has provided while he is unable to take care of it himself, and in its wisdom it has decreed that the right of giving this protection shall fall to an individual who cannot by any fair possibility do injury to his ward; and, it therefore, devolves on the next in blood to the infant in that line through which the property has not descended. This guardianship continues until he is fourteen years of age, at which period the infant may elect a guardian for the remainder of his minority. But every father may by deed or will, executed in the presence of two attesting witnesses, elect a guardian for the government of his children, and of their real and personal estate, until they attain to twenty-one, if unmarried, and thereby exclude the mother or nearest kinsman, who would otherwise be entitled to the wardship. This guardian would be entitled to the direction and care of all the property of the infant of whatever kind. There are also two other species of guardianships, that by *nurture*, where the infant has no

guardian, but the father and mother, and which extends only to the persons, infants, and to the age of fourteen, both in males and females; guardianship by *nature*, to which the father is in the first place entitled, and after him, the mother, and after them, other ancestors according to their degree of relationship, reaches to the full age of twenty-one. In the event of there being no appointment by the father, guardianship *in socage* arises where the infant is seized in lands or hereditaments, unless, from the peculiar custom of the manor in which the property is situate, the lord has the right of appointing the guardianship of copyhold lands within his jurisdiction, or unless they would descend to his guardian at the infant's death. The possession of the guardian is seizin to the infant. After fourteen the infant is competent to elect his own guardian in socage for the remainder of his minority, which election is ordinarily done by deed duly stamped, though it has been held that a simple statement in writing, signed by the infant, is sufficient appointment. In the case of a male, this guardianship will continue till the ward is twenty-one, whether he marries before that time or not, but marriage would terminate the wardship of a female. The guardian is entitled by his election to do all that the infant could have done, in his own name, and not in that of the infant, for he is the representative of the property for the time being. In the defeasement of his trust by any natural or legal act, the right of guardianship will go to the nearest relative of the infant who cannot inherit the property.

If there are two guardians the survivor would take the trust and rights. An illegitimate child is considered to have no ancestors, and, therefore, can have no legal guardians, but the guardian selected by the will of the father will be appointed on petition to the Court of Chancery.

The statute of Charles, however, in abolishing tenures of military service, did not at the same time do away with the rights which accrued to the lord on tenures of free socage, and the principle of escheat consequently holds still upon those tenures wherever any act of the tenant brings it into play. Lands escheated to the lord of the manor go with it, and can be inherited only by those who can inherit the lordship. In thus giving lands the lord cannot disencumber them of any voidable interests created by the last tenant; and the escheat itself will be saved, if after it has accrued the lord accept any service at the hands of the tenant which the latter was required to pay before it occurred as holder of the lands. Lands of copyhold tenure cannot escheat to the crown, but go to the lord of the manor, nor except by special custom will they escheat on conviction of felony when it is not followed by attainder; nor, except in consequence of treason or murder, will they be forfeited where sentence of death has been passed, and then been commuted to transportation, but the queen will take the waste and the produce for a year and a day, the lord taking the rents and profits for the life of the felon, after whose death they go to the heir in the usual way.

Yet if the copyholder has obtained only a conditional pardon before the lord has seized, that seizure will be prevented. Should no heir to the property appear to be admitted, the lord cannot take the estate until after presentment of the death of the tenant, and proclamation of the want of heirs at three consecutive courts. Where the possession of property is apparently in fee simple, and no heir can be found, it escheats to the crown, which is empowered to make grants of the same on trust or in fee, so as either to restore it to family of the party last seized, or to give it to any one whom the crown may desire.

It is enacted by the 4 & 5 Wm. IV., c. 23, that if the trustee of any land die, the Court of Chancery shall have power to appoint a person to convey the estate; and it is also established, that the attainder of a trustee shall in no respect militate against the rights and privileges of the heir, though it does not prevent the escheat of any beneficial interest held by the trustee himself. But, as by such attainder the trusteeship is destroyed, it is decreed by the sixth section of the act that his powers shall revert to the Court of Chancery.

The lord has a remedy by distress for every neglect of service due to him by the tenant, such as omitting to attend his court for two years together; and where there are not goods enough to satisfy the distress, the land will become forfeited, though the tenant may replevin or remove the distress by showing sufficient cause for such a privilege. The lord can, of course, act either by himself or his agent.

Tithes are a highly important species of incorporeal hereditaments. Their original establishment is derived from the Levitical institution of Moses; though when they were first confirmed in the Christian Church is unknown. But as it is undoubted that they were always, in their first use at any rate, appointed for the support of the spiritual ministers of the realm, it is presumed that their origin in this country is very ancient. We find the names of three British ecclesiastics on the records of the Council of Arles, which was held in the year 314; and as it is now pretty well ascertained, both from the writings of Clement and others, and we believe by the roll of bishops from his time down to the period of the Saxon heptarchy, still extant, that as St. Paul himself laid the foundation of the Christian Church in these lands, there is little doubt but that tithes were instituted very early after his stay in the island. The first mention of tithes, however, on record is in the year 778, when they were established in France by Charlemagne. Judge Blackstone says, the first notice of them on British record is in the year 786, though it is very probable that the payment of them was not made compulsory until that decree was confirmed by the kings of Mercia and Northumberland some time afterwards. A thane or lord who established tithes was obliged to give them to the church of the parish in which the lands from which they were derived was situate, but if there were a chapel within his district having a cemetry attached to it, he was allowed to appropriate one third of the

proceeds to its support. When lands did not lie within any parish the crown was entitled to the tithes of them, as being the head of the church.

It was at the dissolution of the monastic corporations that laymen first became possessed of tithes, but in consequence of the express reservation of the *churches* by Henry VIII., the grantees of the tithes could never turn the fabricks to any profane use, though their title to the tithes was put precisely on the same footing as that of those in the hands of ecclesiastics.

Tithes are distinguished into *personal*, *predial*, and *mixed*. Personal tithes are the tenths of the produce of manual occupations such as trades, fisheries, or the like. The tithe of fish taken in the sea, is however, by section 11 of the act by which they were regulated, 2 and 3 Edw. VI., c. 13, made payable to the church where the fisherman hears divine service; but this tithe is only payable by custom. Personal tithes are made payable at Easter. Tithe for any kind of mill is payable by custom, but no tithe can be taken for the profits of any mill where the produce is wholly a dependent upon labour as in copper-mill, fulling-mill, shaving-mill, or glass-house. All ancient corn-mills that have been accustomed to pay tithes; must still continue to pay them, though not otherwise, but they must be paid on all corn-mills erected since the statute. A mill built partly on an ancient, partly on a new site, will not be exempt, though one built on the site of an ancient mill will be exempt, if the ancient mill were exempt. So every alteration of a

mill, provided it be an extension, brings with it a liability to tithe, though not for a party's own corn ground at his own mill and afterwards sold to the public. The tithe consists not in the tenth of the gross amount of goods, but in the tenth of the profits, and the outlay for the erection of the mill may be taken into account as a set off against the profits.

Predial Tithes arise from the vegetable produce of land; all kinds of corn, grass, hops, wood, &c. The tithe is taken when the crop is gathered, or, rather, about to be gathered; and the tenant is bound to set out (a mode of proceeding which cannot be dispensed with, however the weather may seem to direct otherwise) for the parson's use a tenth of every species of produce; as the tenth cock of grass, the tenth cock of barley, and the tenth sheaf of wheat, which he must allow to remain long enough on the ground, together with the rest of the crop, to be examined with it by the parson or his agent. The grass, however, he is not bound to make into hay, as the tithe is properly payable in grass.

Should, however, the tithe-payer commit any trespass by the injury of the tithe, he, or his executors six months after his death, will be liable for an action on the same.

Oak, ash, and elm trees, and other trees also in some districts, if cut for timber after they are twenty years old, are not liable to tithe, unless their tops and lops are cut for fire-wood; though it has been sustained that such is not the case. But the underwood growing from the stools of such trees are liable; so

also are all species of base or coppice wood, as well as wood cut from hedges, though used on the farm. The manner of setting out the tithe of wood is various, according to the custom of the place.

There is also a tithe on the aftermath of meadows, termed *agistment tithe*, provided it is neither consumed by animals used by the superior tenant in husbandry, nor tithed as a mixed tithe within the parish. No tithe is due upon natural grass cut green, and used for fodder; nor upon lucerne or other artificial grasses cut from necessity for the same purpose; but, otherwise, upon these last there is. But such tithe cannot be taken from lands which, during the same year, had been tithed for hay; but a second crop of hay would be titheable, as would also turnips fed by sheep or barren cattle after corn has been gathered from the ground. But sheep kept for the sake of folding, and sold before shearing time, and out of the parish, are liable for agistment tithe, as also are horses constantly used upon a farm out of the parish in which they are fed. Agistment tithe is also due for all travelling cattle, and travellers' horses. But tithe cannot be taken of the chickens of turkeys or other fowls, when tithe had previously been taken of the eggs.

Mixed tithes are derived from natural objects partly nurtured by the care of man, such as milk or wool, of which the tithe must be paid in gross; the tenth of the produce being taken as may be considered most fair between the parties paying and receiving, which is

generally regulated by the custom of the place. So on the tenth day, the milk must be set out in vessels at the common milking place; as must billets of wood at the place where cut. Tithe is due for honey, and for fish taken from a pond not for private consumption, for lamb's wool, and for agistment of yearling, because of increase. Oxen turned out to fatten for sale will have to pay tithe for the herbage they consume, and tithe is due of common right for barren cattle, according to the value of the land, and is paid according to custom or prescription, but it is not due for saddle horses, or for cattle for the plough, or killed for private use.

This distinction of tithes is, however, now resolved into the terms of great and small tithes, the former being considered as *rectorial* and the latter as *vicarial*. This distinction of great and small does not apply to the quantity but to the value of the thing from which they are derived. Great tithes are corn, hay, peas, beans, tares, vetches, clover, and generally wood, but payment of tithe, for vetches, and clover cannot be demanded if they are cut green. Great tithes are not payable more than once a year, excepting clover, which may pay tithe oftener. Small tithes comprise all species of mixed and personal tithe, as also hops, potatoes, wood sometimes, according to the custom, and saffron; also peas and beans planted in rows, clover seed, tare seed, and acorns, if gathered and sold. Small tithes are not like predial tithes, demandable of right, but only payable ac-

cording to custom, and where they have usually been paid.

Minerals, rivers, and quarries, are not titheable by right, though they may become so by custom. Nor, with the exception of customary usages in some ancient cities, are the rents of houses, but where a customory payment is set up in bar of a tithe of rent, the right mode must be ascertained by inquisition of trial, and the books of a former rector may be produced in evidence. Where no customary payment has been alleged in lieu of tithes, a composition for 2*s.* 9*d.* in the pound has been decreed upon the annual value of warehouses erected on the sites of old buildings. Deer and wild animals are not titheable by common right, but they may become so by custom. Nor is tithe due for headlands where there is only room to turn a plough. Composition for a certain sum of money may also be made. But by the late acts 6 & 7 Wm. IV., c. 71, s. 17; & 1 Vic., c. 69, a great change has been effected by the commutation of tithes in England and Wales. By this act two modes of commutation are provided. First, by voluntary assessment on the part of parishioners, having two-thirds of interest in the lands and tithes of the parish, which agreement is binding on the minority unless some sufficient cause be shown to the contrary; and, secondly, by compulsory awards, when the parishioners cannot agree. These provisions are carried into effect by a board of commissioners appointed for the purpose. The object of the act was to convert the whole of the tithes of the

country into a rent charge according to the value of the produce of the land. It ordains that the average price of corn or other produce for seven years, preceding Christmas, 1835, shall be adopted as the base of the tithe-rent, and then that this rent shall be proportionably placed upon all the lands in the parish, which mode of calculating the average is to be followed every Christmas, taking the gross amount of seven years produce into the calculation. There are special provisions where the tithes are not of an ordinary nature, such as hops, garden produce, and wood; and also for special apportionment, where the owner might desire the charge to be laid on one part of his lands in preference to another, provided the annual value of such lands exceeds three-fold the tithe-charge to be laid upon them. Land to the extent of twenty acres may be given as a parochial commutation for ecclesiastical tithes. The consent of the patron and the approval of the bishop are required before the final confirmation of the commutation by the commissioners.

Another mode of composition is one of immemorial usage, called a *modus*. It is called either a district *modus*, or a *farm modus*; extending through all the lands of a district, or confined simply to some particular farm, and the requisites to establish it are the same as in other matters of prescription, as also that it should be certain and invariable. The terms should, however, be construed reasonably; as thus, a variation may arise from en-

croachment through ignorance, either on the part of the parson or the tenant. Modus generally consists in money, but where it is paid in kind, it must not be of the same nature of the thing for which it is paid. Thus, one load of hay in lieu of the tithe of all hay, is considered bad, because it might not be justice to the parson. But a modus wherein it appears that a benefit accrues to the benefice will hold good, as a modus of thirteen eggs once a year, instead of a tithe of all eggs is good, because the parson gets his eggs, though nobody else may have any all the year.

An issue will be granted to try the question of fact, where a modus is pleaded and supported by reasonable evidence, before the court will decree against the common law right of the parson. And in the case of a farm, the court will first inquire into the ancient existence of the farm, and then into the payment of the modus. Where, on an issue taken, if a modus stated exceed the value of the tithes in the reign of Richard I., it is called a *rank* modus; and though its being so is no positive proof of its insubstantiality, if it can be shown to have existed immemorially, it is yet a presumption against the payment from its manifest improbability. In extreme cases, a court of equity has the right of deciding upon such facts as would tend to discredit the modus. A modus is considered bad, where a district modus is set up, and it is proved that certain farms within the district have not paid it—a penny in lieu of tithe of hay—a penny in lieu of tithe of calves—a penny in lieu of tithe of hay from every

occupier of a house, as well as of land, who has land attached to his house—a penny in lieu of small predial tithes—of 4*s.* at Easter, in lieu of tithe of hay of a farm—of 10*s.* a score in lieu of tithe of sheep—and so of every thing that is not manifestly relevant and appropriate as a reason for remission of tithe. If a modus bad in law be received by a vicar, it is proof of the endowment of tithe.

General report is good, as establishing a customary modus through the whole parish, for public rights, may be established by common report; but it will not avail for the establishment of a farm modus, or any matter of private right. The private memorandum or receipt, however, of the present or former vicar or rector, will establish a private right as to mode and amount of payment of tithe; but such memorandum or receipt must be of sufficiently late date, so that no doubt can exist, or, if it exist, can be removed, as to the authenticity of the hand-writing.

Total and entire exemption for tithe is another privilege which we have to consider. The king from his character of a mixed person being both a lay and a spiritual person, is discharged from tithes, as also are all lands lying within a royal forest, and so are all ecclesiastics in right of lands held by them in their spiritual capacity, so that the rector does not pay to the vicar nor the vicar to the rector, though this is said to allude merely to such as are rector and vicar of the same church. But this exemption does not extend to lands held by the churchwarden for the repairs of the

church. Nor does the right of exemption extend from the king to his lessee except by prescription. All the lands of the great abbeys dissolved by Henry VIII., as also all the lands of the knights of St. John, had the exemption expressly continued to them which they enjoyed in consequence of being in the occupation and possession of ecclesiastical corporations; but to the lands of the lesser monasteries this favour was not accorded. Unity of possession, where the party entitled to the tithes becomes also owner of the land, has been supposed to discharge the land from liability to tithe, but this is an error, for the tithe is a property distinct from the land, out of which it issues, and it therefore only becomes merged during the unity of possession; it is not destroyed.

By the statute 43 Eliz., c. 2., s. 1., tithes are expressly subjected to poor's rates, and neither vicar nor rector are exempt, including in this non-exemption their tithes as well as their benefices; in consequence of which they are considered the occupiers even though they have let their tithes to any one of their parishioners or other person.

Tithe, partaking of the character of land out of which it issues, has been placed on the same footing, as to actions for recovery, or for redress of injury therein, as also as to title to possession, being also placed within the statute 3 & 4 Wm. IV., c. 27, as to bar of title to claimants after twenty years possession. In the case of subtraction of tithes, an action of debt will lie for three times the amount, (which is an impo-

sition of forfeiture put on by the statute of Edward VI.), or by a suit in the Ecclesiastical Court, or lastly, by a suit in the Court of Chancery, or the Exchequer, which in some cases is far preferable, as where there are many parishioners to contend with. In the case of quakers the amount of tithe not exceeding *50l.* may be recovered by distress granted by two justices of the peace, neither of them being patron of the living, but the execution will lie only against the property and not the persons of members of the sect. The claim for tithes is like other debts limited to a period of six years. In an action to recover tithes from a clergyman in the event of the sheriff not being able to recover the amount on the plea that the defendant is a beneficial clerk without lay fee, the bishop of his diocese is competent to sequestrate the amount from his living, which sequestration must be duly published by being affixed to the church door and read during Divine service. After which the necessary allotments of the profits of the cure are made for the payment of the debt and sequestrators for trouble, and to the incumbent for support.

Under these several heads is ranged all the realty of the kingdom, and out of it arise the estates of money value, of which we shall have to speak hereafter.

THE END.

Clarke, Printers, Silver Street, Falcon Square, London.